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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982.

COMPUTER SCIENCES CORPORATION, JOHN W. LUKE, ERWIN L. ALLEN, THOMAS A. MARTI, NORMAN W. DERRICK, PETER C. LOUX, and HERBERT G. BLECKER, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a district court correctly dismissed

(a) allegations of "racketeering" brought pursuant to the Racketeer Influenced and Corrupt Organizations Act of 1970 ("RICO"), 18 U.S.C. § 1962, against officers and employees of a nationally known and publicly held corporation who are alleged to have submitted, entirely on the corporation's behalf, false claims to the United States on a long-term service contract,[1] and

(b) allegations pursuant to RICO and the Mail and Wire Fraud laws, 18 U.S.C. § 1341, 1343, against a corporation and its officers and employees where, in order to circumvent Congress' exclusion of false claims from the list of predicate offenses upon which a RICO claim may be based, prosecutors characterized as mail and wire fraud conduct that was also specifically charged as a violation of the False Claims Act, 18 U.S.C. § 287.

2. Whether the violation of Rule 6(d) of the Federal Rules of Criminal Procedure by repeated, unreprimanded intrusions into ongoing grand jury proceedings by individuals under control of the prosecutor warranted the dismissal without prejudice of a resulting indictment.

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[1] Because the RICO charges have been dismissed against Computer Sciences Corporation ("CSC"), the corporation does not join this petition insofar as it contends that RICO counts against the individual defendants should have been dismissed. CSC does join with the individual petitioners in asserting (i) that the mail fraud and wire fraud laws are not violated by conduct specifically covered by the false claims provision and (ii) that the district court properly dismissed all counts because of repeated improper intrusions into the secrecy of the grand jury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-18a, *infra*) was filed on June 16, 1982, and is not yet reported. The order and opinion of the district court (Pet. App. C, pp. 21a-63a, *infra*) was filed on March 5, 1981, and is reported at 511 F. Supp. 1125.

JURISDICTION

The decision of the court of appeals was issued on June 16, 1982. A timely petition for rehearing was denied on September 27, 1982. Pet. App. B, pp. 19a-20a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED

The pertinent sections of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-64, the False Claims, Mail Fraud, and Wire Fraud Acts, 18 U.S.C. §§ 287, 1341, and 1343, and Rule 6(d) of the Federal Rules of Criminal Procedure are reproduced at Pet. App. E, pp. 67a-73a, *infra*.

STATEMENT

This case concerns charges of racketeering, fraud and submission of false claims made against Computer Sciences Corporation ("CSC"), a corporation whose stock is traded on the New York Stock Exchange, and six individuals who were involved in the administration of various aspects of a contract between CSC and the General Services Administration ("GSA"), under which all federal agencies were provided access, on a time-sharing basis, to a nation-wide teleprocessing system. After extensive briefing and oral argument, District Judge Richard L. Williams dismissed the 57-count indictment, which contained three charges based upon the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961, *et seq.*, 40 counts charging mail fraud and wire fraud (18 U.S.C. §§ 1341, 1343), and 14 counts charging the submission of false claims (18 U.S.C. § 287). R. 41.[2] The court of appeals reversed the district judge's order and remanded the case for trial against all defendants on all counts other than RICO counts insofar as they charged CSC and one count that was concededly time-barred.

The indictment was supported principally by allegations concerning CSC's method of billing GSA for use of the teleprocessing network. The governing contract—an elaborate document consisting of hundreds of pages—contained complex provisions for the computation of user fees. Because the computer network could be used in thousands of different ways,

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[2] "R." refers to the Appendix filed in the court of appeals.

fees were calculated on the basis of "System Resource Units," which were an amalgam of computer resource functions such as storage of information, time, retrieval, use of the "central processor," and other specified elements. An "algorithm" was established to compute how many "System Resource Units" were used in each job. That "algorithm" measured the consumption of each element and assigned weights to each component in the over-all computation.

GSA awarded CSC the contract in 1972, after a lengthy competitive procurement process in which comparative cost and technical capability among various interested companies was evaluated by GSA's cost and technical teams. The contract was concluded at the close of its fourth renewal period in 1977. In late 1978 the Department of Justice initiated an investigation into whether CSC had overbilled the government.

CSC cooperated fully in the grand jury investigation. It made records available and produced its officers and employees, unrepresented by counsel, for interviews and grand jury appearances. Unknown to CSC, on several occasions during the grand jury proceedings, individuals assigned to the prosecutors' office, as well as other law-enforcement and unidentified personnel, entered the grand jury room while witnesses were testifying. These intrusions are discussed in more detail at pp. 18-19, *infra*.

On October 8, 1980, the instant indictment was returned. Its principal allegation, as described by the government, was "that the defendants fraudulently overcharged the government for computer processing services, in excess of the fixed price authorized by the contract." Brief for the United States, 4th Cir., Nos. 81-5053 and 81-5099, pp. 2-3. This was accomplished, according to the indictment, by unauthorized adjustments of the weights assigned to the different elements in the "algorithm" used to measure "System Resource Units." CSC has consistently maintained that its adjustments of the weights in the algorithm were encompassed by the governing contract. The indictment also charged in six of its counts that a

particular computer program provided to GSA under the contract had been misrepresented to GSA as "a substantially improved version of a program previously provided to GSA at a lower price." *Id.* at 3.

Rather than making these allegations straightforwardly as charges solely under 18 U.S.C. § 287, the False Claims Act, the prosecutors alleged that CSC's "fraudulent overcharges" also constituted mail fraud because CSC was paid by checks transmitted through the mails. And since CSC's teleprocessing network transmitted signals across state lines, wire fraud charges were also included in the indictment.

Having charged the defendants with violations of 18 U.S.C. §§ 1341 and 1343, the prosecutors also brought their case within RICO, which specifies mail and wire fraud, *but not the submission of false claims*, as "predicate offenses" for racketeering charges. On this ground, a highly inflammatory and potentially prejudical allegation that a GSA employee had been bribed in 1971 with an offer of employment by CSC, which would have been barred by the applicable statute of limitations, was included in the indictment as an act within the ten-year period covered by RICO.

After considering briefs and hearing legal argument, Judge Williams ruled initially that he would dismiss all counts of the indictment except for the false claims charges. R. 41. He explained that "Congress did not intend to have mail fraud tacked onto all false claims charges, and certainly did not intend to have false claims charges become the basis for RICO charges." R. 104; Pet. App. C at 40a, *infra*.

Additional hearings were then held on other defense motions. Judge Williams subsequently dismissed, without prejudice to reindictment, the remaining fourteen counts of the indictment on the ground that unauthorized intrusions into the grand jury proceedings required that remedy. He also dismissed all counts against Norman Derrick with prejudice because of prosecutorial misconduct. R. 128; Pet. App. C at 63a n.13, *infra*.

The court of appeals reversed. Acknowledging that Rule 6(d) of the Rules of Criminal Procedure had been violated by "intruders . . . apparently under the control of the prosecutors, who were obviously not diligent in keeping the sanctity of the grand jury room inviolate" (Pet. App. A at 8a, *infra*), the court said that only if there were "demonstrable prejudice" would dismissal of the indictment be "appropriate." Pet. App. A at 6a, *infra*.

The court of appeals also reversed Judge Williams' dismissal of the mail fraud, wire fraud and RICO counts on the ground that there is no "mutual exclusivity" between those laws and the False Claims Act. Pet. App. A at 10a, *infra*. It did so despite acknowledging that the petitioners "do not immediately appear to fit a category against whom the act [RICO] was generally considered to be directed" and observing that it was "tempting" to rule that RICO is inapplicable to such circumstances. Pet. App. A at 15a, *infra*.

The court of appeals did, however, rule that a prosecution could not be brought under 18 U.S.C. § 1962 against an entity that is named as both a defendant and the affected "enterprise" specified in the federal law. Pet. App. A at 17a, *infra*. For this reason, the court of appeals sustained the dismissal of Counts 1-3 against CSC, but reinstated the RICO counts against the individual defendants. The court of appeals also reversed the dismissal with prejudice of the charges against Norman Derrick. Pet. App. A at 12a-14a, *infra*.

REASONS FOR GRANTING THE WRIT

In its present posture, this case raises important substantive and procedural issues that relate to the integrity of the administration of federal criminal law and which are subject to conflict and disagreement among federal courts. After full hearings and ample briefing, a thoughtful district judge concluded that the prosecutors had overreached by:

(1) invoking RICO, a recently enacted law that was patently not intended by Congress to reach the kind of corporate misconduct alleged in this indictment;

(2) "pyramiding" routine allegations of false claims into a series of mail frauds and wire frauds in order to be able to bring RICO charges that would otherwise not be an available basis for prosecution; and

(3) permitting personnel under the prosecutors' supervision to make improper visits to the grand jury room while witnesses were testifying, and making no effort to reprimand those guilty of such invasions or to prevent their recurrence.

The district court's ruling, which does not prevent the prosecutors from seeking to re-indict the corporation and five defendants on false claims charges, was an effective warning to prosecutors (1) not to burden the federal courts with extravagant theories expanding federal criminal statutes far beyond their original intent, and (2) not to conduct federal grand jury proceedings so carelessly that the grand jury's independence and confidentiality are compromised. The court of appeals' reversal has the opposite effect. It invites waves of novel RICO claims, both criminal and civil, and effectively repeals the False Claims Act by converting every false claim into a form of mail fraud. The court of appeals' ratification of the grand jury proceedings—despite blatant violations of the rule of grand jury secrecy prescribed by the Federal Rules of Criminal Procedure—conflicts with the remedies heretofore applied by other federal courts for violations of Rule 6(d) and nullifies its protections. The standard applied by the court below, which rests on a patent misapplication of this Court's recent decision in *United States* v. *Morrison*, 449 U.S. 361 (1981), opens the door to proceedings that jeopardize the independence of the grand jury.

I

NEITHER RICO NOR THE MAIL AND WIRE FRAUD LAWS APPLY TO THE TYPE OF CONDUCT ALLEGED IN THE INDICTMENT

A. The prosecution's legal theory overrides a statutory limitation on RICO and perverts RICO's statutory policy of preventing the infiltration of legitimate businesses by criminal elements.

When stripped to its precise factual allegations, this indictment accuses officers and employees[3] of a nationally renowned corporation of fraudulently overcharging the United States on a service contract for and on behalf of the corporation. These allegations of overbilling state a classic False Claims Act violation. Since false claims violations are not RICO predicates, however, the prosecutors in the instant case characterized the alleged overbillings as mail and wire frauds, based on the fact that the United States pays all its bills by mail and that the computer processing involved interstate wire transmissions. They thereby "pyramided" the overbillings into RICO violations, thus avoiding the limitations on RICO which Congress had established by carefully defining the requisite predicate offenses.

The prosecutors assert that the *literal* terms of the 1970 law designed to reach "racketeering" have been satisfied by this

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[3] Five of the six individual defendants were officers or high-ranking employees of CSC during the relevant period. John W. Luke was a member of CSC's Board of Directors, a Vice President of CSC, and President of CSC's Data Services Group. Erwin L. Allen served in various senior executive positions. Thomas A. Marti was a Financial Analysis Manager, Norman W. Derrick served as a Director of Business Analysis, and Peter C. Loux was a customer sales representative with CSC. The sixth defendant, Herbert G. Blecker, is President of Icarus Corporation, a company that develops and markets software products and that provided programs to CSC for use in CSC's teleprocessing service.

indictment. "Racketeering activity," as defined in 18 U.S.C. § 1961(a), includes mail and wire fraud, and CSC's Infonet Division has, according to the prosecutors, been "conducted" by the individual defendants in a manner that includes acts of mail and wire fraud. But in construing a statute it is a " 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.' " *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 201 (1979), *Connell* v. *Plumbers & Steamfitters*, 421 U.S. 616, 628 (both quoting *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 469 (1892)). The obvious weakness in the prosecutors' position is that if the statute is thus implemented literally, Congress' purpose is perverted in at least two ways:

First, this application of RICO reads out of the statute Congress' deliberate exclusion of false claims from its enumeration of predicate offenses.

Second, this application of RICO converts a statute designed to protect legitimate businesses against underworld infiltration and abuse into a weapon to be used against such legitimate businesses and their officers if, in carrying out a company's routine business operations and in furthering its interests, those officers misstep and engage in criminal activity.

In 1981, when this Court was considering whether RICO's expansive language could be applied to a wholly illegitimate "enterprise," the Solicitor General recognized in his brief that given the broad literal reach of RICO, "extreme cases can be conjured up." He assured the Court, however, that federal prosecutors would not routinely invoke RICO whenever its words could be satisfied, but would exercise "sound discretion . . . in accordance with the facts and circumstances of . . . [each] particular case." Brief for the United States, *United States* v. *Turkette*, No. 80-808, pp. 24-25, n.20. The indictment in this case belies those assurances.

Various courts of appeals have warned against "pyramiding" and other abusive and excessive use of RICO. *See, e.g., United*

States v. *Fine*, 644 F.2d 1018, 1023, n.15 (5th Cir.), *cert. denied*, 102 S.Ct. 669 (1981); *United States* v. *Guiliano*, 644 F.2d 85, 88 (2d Cir. 1981) ("We doubt that Congress expected [RICO] to be used in circumstances where an embezzlement can be escalated into a federal bankruptcy fraud, and then joined with another bankruptcy fraud to form an alleged pattern of racketeering activity."); *United States* v. *Huber*, 603 F.2d 387, 395-396 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *cf.*, *United States* v. *Aleman*, 609 F.2d 298, 306 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980). In this case, the court of appeals acknowledged that the charges in the indictment did not "immediately appear to fit a category" designed to be covered by RICO. Pet. App. A at 15a, *infra*. Nonetheless, it reversed the district court's dismissal of the indictment and thereby signaled to prosecutors that the bringing of such excessive criminal charges is permissible.

Nor should it be thought that the proper scope of RICO can be reviewed later in this case if a trial results in a conviction. Such a view fails to consider the immediate and severe burden imposed by these prosecutions on the federal court system and on targets of pending and future criminal allegations. As complex and time-consuming as mail or wire fraud prosecutions may now be, they will become even longer and more difficult, and will be more sharply contested, in view of the drastic consequences of a RICO conviction. The mere invocation of the words "racketeer influenced" will have an inflammatory effect on most juries, and use of RICO will allow a prosecutor to bring charges before the jury that would otherwise be time-barred. Many defendants will be unfairly prejudiced if they are forced to stand trial on RICO counts that should never have been brought.

Another substantial consequence of permitting a prosecution of this kind is its impact on potential *civil* RICO cases. 18 U.S.C. § 1964 grants a civil remedy, with treble damages and attorneys' fees, to "any person injured in his business or property" by a RICO violation. This provision is being increasingly invoked by imaginative lawyers as a basis for bringing into

federal court a host of unusual civil claims, many of which would ordinarily be cognizable only in state courts.[4] If a criminal RICO case can proceed against officers and employees of a company like CSC merely because they are charged with having submitted two or more false claims on behalf of the corpora-

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[4] Indeed, a review of recent federal court cases suggests that the subject-matter and scope of civil RICO claims are limited only by the imaginations of ingenious plaintiffs' attorneys. Civil RICO claims have been brought by: claimants to leadership of a Jewish Hasidic dynasty against an opposing group of claimants, *see Beth Yitzhok* v. *Briskman*, No. CV 82-2066 (E.D.N.Y. filed July 15, 1982); a disgruntled member of a church charging she was harassed by the church leadership, *see Van Schaick* v. *Church of Scientology of Cal., Inc.*, 535 F. Supp. 1125 (D. Mass. 1982); purchasers of allegedly defective low pressure, high speed, flexible coupling units installed in the propulsion units of sailing vessels, *see Waterman S.S. Corp.* v. *Avondale Shipyards, Inc.*, 527 F. Supp. 256 (E.D. La. 1981); purchasers of real estate claiming that seller failed to reveal the existence of a prior mortgagee, *see Salisbury* v. *Chapman*, 527 F. Supp. 577 (N.D. Ill. 1981); bank customers alleging they were charged excessive interest rates on loans, *see Kleiner* v. *First Nat. Bank*, 526 F. Supp. 1019 (N.D. Ga. 1981); municipal employees claiming that they were forced as a condition of employment to contribute to a political party, *see Cullen* v. *Margiotta*, 618 F.2d 226 (2d Cir. 1980); customers charging that a telephone answering service fixed prices, *see Barr* v. *WUI/TAS*, 66 F.R.D. 109 (S.D.N.Y. 1975); plaintiffs attempting to "exploit the vague language of the civil provision of the federal anti-racketeering statute in an attempt to recoup investment losses," *Mauriber* v. *Shearson/American Express*, No. 82 Civ. 1802 (S.D.N.Y. Aug. 27, 1982); the daughter of a deceased claiming she was deprived of her inheritance by the deceased's widow, *see Gunther* v. *Dinger*, No. 81 Civ. 6985 (S.D.N.Y. April 30, 1982); and at least two women charging that their former husbands illegally deprived them of matrimonial property, *see Erlbaum* v. *Erlbaum*, Fed. Sec. L. Rep. [CCH] ¶ 98,772 (E.D. La. July 13, 1982); *Alton* v. *Alton*, No. 82 Civ. 0795 (S.D.N.Y. July 8, 1982).

tion, there is no conceivable limit to the kinds of civil cases the lower courts will have to face in the very near future.[5]

By the time this case would reappear on the Court's docket after a trial, the damage to the dockets of federal courts will have been done. Lawsuits with bizarre claims will have been filed and, in light of this decision, permitted to go to trial. The proper bounds of RICO should be established here and now before it is the subject of further abuse.[6]

B. The prosecution's legal theory improperly escalates all false claims into mail and wire fraud charges.

The prosecutors managed to bring their allegations within RICO's literal terms only because they creatively character-

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[5] We do not believe it is necessary at this juncture to verbalize *precisely* where the line must be drawn between conduct that is within the reach of RICO and conduct outside the racketeering law. That question can be fully canvassed in briefs on the merits. It suffices for present purposes to note that RICO surely should not apply (1) where the individuals have not "infiltrated" the corporation or surreptitiously assumed control of it, (2) where the alleged "racketeering" is not a deviation in kind from the corporation's past legitimate business activities, and (3) where the alleged criminal conduct benefits the corporation, and not the individuals charged with "racketeering."

[6] An instructive parallel is the experience this Court has had with the issue of official immunity for torts allegedly committed by Cabinet-level personnel. The Court initially set down a qualified immunity standard containing both subjective and objective components. *See Butz* v. *Economou*, 438 U.S. 478 (1978). That standard led to inequitable consequences to defendants, which were described in this Court's opinion in *Harlow* v. *Fitzgerald*, 102 S.Ct. 2727 (1982). As a result, the standard was modified to eliminate the subjective element. *Id.* at 2737-2738. This after-the-fact adjustment did not, of course, eliminate the adverse consequences suffered by defendants who had incurred great personal expense and hardship in the interim.

ized the defendants' submission of allegedly false claims—which the government itself described in its appellate brief as "fraudulent overcharges"—as mail and wire fraud. In order to establish a RICO offense, the government must prove the existence of two "predicate offenses" within the previous ten years. Congress included mail fraud and wire fraud among those offenses upon which a RICO offense can be based. *See* 18 U.S.C. § 1961(1). But Congress deliberately excluded violations of the False Claims Act from the list of predicate offenses under RICO. The prosecutors knew, therefore, that if they merely charged the alleged submission of false bills to the government as false claims, they could not bring any RICO charges. The prosecutors attempted to evade the limitations of RICO by charging that this alleged conduct constituted mail and wire fraud.

District Judge Williams recognized this as an impermissible prosecutorial ploy, and he dismissed the mail fraud, wire fraud, and RICO counts because "Congress did not intend to have mail fraud tacked onto all false claims charges, and certainly did not intend to have false claims charges become the basis for RICO charges." R. 104, Pet. App. C at 40a, *infra*. This "pyramiding" of fraud and racketeering charges on a routine false claims case was impermissible.

The court of appeals has now issued an invitation to prosecutors to evade the predicate offense limitation on RICO. Since the government is required by law to pay all bills by mail (Comptroller General Decision A-83685, Mar. 12, 1937), the decision below will tempt prosecutors to employ mail fraud allegations routinely as a detour around the statutory exclusion of false claims from the list of predicate offenses. Nor is the "pyramiding" option confined to the false claims context. Although tax violations are not specifically chargeable under RICO, under the theory relied upon by the prosecutors in this case, an individual taxpayer who files false tax returns by mail in two of ten years for a family corporation could be indicted as a "racketeer." And the Court of Appeals for the Second Circuit has noted the comparable danger that simple embezzlement

"can be escalated into a federal bankruptcy fraud, and then joined with another bankruptcy fraud to form an alleged pattern of racketeering activity" under RICO. *United States* v. *Guiliano*, 644 F.2d 85, 88 (2d Cir. 1981).

Furthermore, in reversing the district court, the court of appeals ignored guiding principles announced by this Court, misinterpreted the legislative history of the mail and wire fraud laws, and squarely rejected a persuasively reasoned decision by Judge Edward Weinfeld of the Southern District of New York.

(i) *This Court's Guidelines.*—In *Simpson* v. *United States*, 435 U.S. 6 (1978), and in *Busic* v. *United States*, 446 U.S. 398 (1980), this Court reaffirmed "the principle that gives precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern . . ." 435 U.S. at 15; *see* 446 U.S. at 406 ("a more specific statute will be given precedence over a more general one. . ."); The conduct alleged in this indictment violated the "specific" statute, first enacted in 1863 (12 Stat. 696), prohibiting the submission of false claims to the United States. The more "general" statutes, which imposed criminal penalties for all kinds of fraud involving use of the mails or the interstate wires, were enacted in 1872 (17 Stat. 323) and in 1952 (66 Stat. 722). Under the principles of *Simpson* and *Busic*, the "specific" false claims law must be "given precedence" over the more "general" mail and wire fraud laws. Accordingly, the offenses alleged in this indictment may be charged under the specific statute, and are not subject to the general laws.

If that were not the rule, the more "specific" statute would effectively be written off the statute books. As a result of an administrative regulation requiring the United States to pay *all* its contractors through the United States mails (Department of Treasury, Division of Disbursement Procedure Manual, Part 3 at 34-24; Comptroller General Decision A-83685, March 12, 1937), the prosecutors' theory means that the 1863 false claims law (which is presently codified at 18 U.S.C. § 287)

is now duplicated by the 1872 mail fraud law. Such a result is inconsistent with governing principles of statutory construction. *See Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 560 (1963); *cf. Parr* v. *United States*, 363 U.S. 370, 391 (1960).

The court of appeals mistakenly believed that it could affirm the district court's ruling only by concluding that the indictment violated the rule of *Blockburger* v. *United States*, 284 U.S. 299 (1932). This was a fundamental misunderstanding of *Blockburger*. *Blockburger* provides a constitutional rule regarding double jeopardy and states one of several guidelines for statutory construction. But *Blockburger* is not—as the court of appeals apparently believed—the exclusive means of divining Congressional intent. *See Simpson* v. *United States*, 435 U.S. at 12. In this case, the rule of statutory construction adopted by this Court in *Simpson* and *Busic* establishes that Congress did not intend alleged false claims to be tried as mail fraud.

(ii) *The Legislative History of the Mail Fraud Law.*—The mail and wire fraud laws, when enacted in 1872 and 1952, were designed to reach with criminal sanctions various kinds of frauds that had not previously been subjected to federal criminal law. Chief Justice Burger, joined by Justice White, characterized the mail fraud law in his own opinion in *United States* v. *Maze*, 414 U.S. 395, 405-06 (1974), as "a stop-gap device to deal on a temporary basis" with newly invented forms of fraud "until particularized legislation can be developed and passed to deal directly with the evil." *See also* 414 U.S. at 405 (opinion of the Court). That view of mail fraud—as a means of using federal law enforcement on a "stop-gap" basis to punish conduct that was not previously prohibited—is supported by the sparse legislative history of the 1872 law. There was no suggestion whatever that the submission of false claims to the government—which had been rendered criminal by a law enacted nine years earlier—was to be covered, if the mails were used, by the later statute.

The court of appeals demonstrated that it totally misunderstood petitioners' argument when it commented (p. 9a n.10,

infra) that "it requires a great stretch of imagination to attribute an intent to Congress in 1863 prospectively to render inapplicable to frauds against the government any statute which might later be enacted by a subsequent Congress or Congresses." It is not Congress' intent in 1863 that renders the mail fraud provision inapplicable. This result is mandated by Congress' intent *in 1872* not to duplicate any previously enacted law.

(iii) *Conflict with United States* v. *Henderson*.—The court of appeals acknowledged that its reversal of Judge Williams' decision on this issue conflicted with the decision of Judge Edward Weinfeld of the Southern District of New York in *United States* v. *Henderson*, 386 F. Supp. 1048 (S.D.N.Y. 1974). *See* Pet. App. A at 11a n.13, *infra*. In *Henderson*, the district court dismissed counts of an indictment that charged an alleged tax evader with mail fraud because he had sent fraudulent documentation through the mails. Judge Weinfeld reviewed the legislative history of the mail fraud law and concluded that the mail fraud statute was not intended to cover a scheme to defraud the government. He said, in language directly applicable to this case (386 F. Supp. at 1054):

> [T]he mail fraud counts [were a means of] pyramiding sentences in the event of a conviction . . . [and] were impermissibly used in an attempt to reach the same offenses and to increase penalties in the event of conviction, beyond the intent of Congress.

In this case there was, of course, an additional impermissible motive beyond the "pyramiding" of offenses; the prosecutors were trying to bring the defendants' conduct under RICO, and they could do so only if they could charge mail fraud.

The Fourth Circuit refused to follow the *Henderson* decision in this case because it had been "flatly rejected" by the Ninth Circuit in *United States* v. *Miller*, 545 F.2d 1204, 1216 n.17 (9th Cir. 1976), *cert. denied*, 430 U.S. 930 (1977). The Second Circuit, however, has not "rejected" the *Henderson* decision, and Judge Friendly, in *United States* v. *Mangan*, 575 F.2d 32, 48-49 (2d Cir.), *cert. denied*, 439 U.S. 931 (1978), while leaving

"to another day" the precise issue in *Henderson*, "expressed misgivings over the Government's use of the mail fraud statute as a basis for additional counts in an indictment the gravamen of which was the violation of other federal criminal statutes . . . ." *See also United States* v. *Dixon*, 536 F.2d 1388, 1398-1401 (2d Cir. 1976).

The court that decided *Henderson*—the Southern District of New York—is a commercial center that is a frequent venue for mail and wire fraud prosecutions. The issue presented by this case—whether allegations of fraudulent activities that constitute crimes covered by more specific federal laws are also covered by the mail fraud statute—is likely to recur frequently in New York City. A division of opinion between a highly respected federal judge in New York and the courts of appeal in California and Richmond has practical consequences similar to those of a conflict among circuits. This Court should grant certiorari and resolve that conflict so that the same principles of law will be applied in Los Angeles as in New York.

We note, in conclusion, that although this Court has had occasion to consider—and to deny—a number of petitions challenging RICO convictions,[7] we know of no case that has come before this Court in which officers and employees of a nationally renowned corporation whose stock is publicly traded on the New York Stock Exchange have been charged with a RICO offense for conduct that was designed to benefit the corporation and was not otherwise "typical of the crimes

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[7] *See, e.g.*, *United States* v. *Barber*, 668 F.2d 778 (4th Cir.), *cert. denied*, 51 U.S.L.W. 3254 (Oct. 4, 1982); *United States* v. *Bagnariol*, 665 F.2d 877 (9th Cir. 1981), *cert. denied*, 102 S.Ct. 2040 (1982); *United States* v. *Welch*, 656 F.2d 1039 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 1767 (1982); *United States* v. *Sutherland*, 656 F.2d 1181 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 1451 (1982); *United States* v. *Angelilli*, 660 F.2d 23 (2d Cir. 1981), *cert. denied*, 102 S.Ct. 1442 (1982).

committed by persons involved in organized crime . . . as a major source of revenue and power for such organizations." *United States* v. *Turkette*, 452 U.S. 576, 590 (1981). Rather than permitting the prosecution to proceed to trial in this case, this Court should reverse the decision of the court of appeals and sustain dismissal of the RICO, mail fraud and wire fraud counts.

II

DISMISSAL OF THE INDICTMENT WITHOUT PREJUDICE WAS THE CORRECT REMEDY FOR THE REPEATED INVASIONS OF THE GRAND JURY

Rule 6(d) of the Federal Rules of Criminal Procedure is specific in enumerating those who may be present in the grand jury room during its proceedings, and the overwhelming weight of authority in federal courts is that a violation of Rule 6(d) is, in and of itself, reason for dismissal of the indictment. The decision of the court below refusing to apply a *per se* rule to invalidate any indictment returned by a grand jury penetrated by unauthorized invaders directly conflicts with the rule governing the Fifth and new Eleventh Circuits as announced in *United States* v. *Echols*, 542 F.2d 948, 951 (5th Cir. 1976), *cert. denied*, 431 U.S. 904 (1977). The *Echols* rule requiring dismissal *per se* is consistent with the overwhelming weight of federal authority, as described in the following conclusion drawn from eighteen cited federal court rulings in *United States* v. *Lill*, 511 F. Supp. 50, 58 (S.D.W.Va. 1980) (footnote and citations omitted):

> While there is a split of authority among the states as to whether the presence of an unauthorized person before a grand jury is *per se* prejudicial, thereby requiring dismissal of the indictment, federal decisions which have

addressed the point are, in the main, uniform in adhering to the *per se* rule.[8]

See also United States v. *Braniff Airways, Inc.*, 428 F. Supp. 579, 582-83 (W.D. Tex. 1977); *United States* v. *Bowdach*, 324 F. Supp. 123, 124 (S.D. Fla. 1971).

The record in this case showed that there were at least five unauthorized entries into the grand jury room while witnesses were testifying,[9] and that four of these intruders were persons "under the control of the United States Attorney." R. 126, Pet. App. C at 61a, *infra*. The district judge concluded that there had been "repeated, unreprimanded intrusions into the grand jury room of persons under the control of or acting for the convenience of the federal prosecutor." R. 127, Pet. App. C at 62a, *infra*. Consequently, he dismissed the indictment without prejudice, thereby leaving the prosecutors free to attempt to obtain a new indictment from an untainted grand jury.

The court of appeals refused to sustain this dismissal, although it concluded that the prosecutors "were obviously not diligent in keeping the sanctity of the grand jury room inviolate." Pet. App. A at 8a, *infra*. The court held that the

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[8] The *Lill* case concerned two government agents who testified together before the grand jury with regard to records they had reviewed that pertained to certain overt acts in a proposed indictment. The district court held that although there was neither actual prejudice nor any possibility of prejudice, "dismissal might well be decreed as the proper and prudent course" if the issue had arisen—as it has in this case—before trial. 511 F. Supp. at 61. Since it was first raised "after a three-month trial conducted at enormous expense to the United States and the defendants" (*id.*), the district court refused to disturb the convictions.

[9] The five intrusions were known as a result of pre-trial discovery, during which several grand jury transcripts were disclosed to the defense. The prosecutors refused to make any other transcripts available to the defendants but asserted, in an affidavit filed in the court of appeals, that there was only one other possible violation of the Rule.

prosecutors survived this legal challenge "by the skin of their teeth" merely because, in the court's view, the invasions were "rare, inadvertent and nonprejudicial." *Id.*[10] Besides conflicting with the *per se* rule that has been adopted throughout the federal system, the requirement that prejudice be shown—now unique to the Fourth Circuit—overlooks the harmful consequences of permitting dismissal to turn on whether the court finds prejudice. If a *per se* rule is not applied, the district court will be required to release to the petitioners previously secret grand jury transcripts[11] and hear testimony from the prosecutors, the intruders, the witnesses, and, most importantly, the grand jurors themselves. Such an extensive inquiry into the grand jury process would further undermine the policy of grand jury secrecy that underlies Rule 6(d) of the Federal Rules of Criminal Procedure.

Nor was the court of appeals correct in relying upon the duration of the entire grand jury investigation in determining

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[10] On this record, there is no way of knowing whether the intrusions were "rare" since only a small portion of the grand jury proceedings were disclosed. The conclusion that they were "inadvertent" is contradicted by the fact that the intruders were never reprimanded and that four of the five known intruders were under the prosecutors' control. The conclusion that the intrusions were nonprejudicial is unwarranted since there was no hearing as to prejudice in the district court.

[11] The first intrusion indicated by the portions of transcript made available to the defense in this case concerned an "unidentified woman" who entered the grand jury room and made "remarks . . . toward [the prosecutor] on an unrelated matter off the record." R. 133. The prosecutor then told the grand jurors that she had delivered "a document that was subpoenaed by this Grand Jury"—suggesting that it was not an "unrelated matter" that she had discussed with the prosecutor in the presence of the grand jurors. R. 133. Without further information as to what happened in later grand jury sessions as shown by the transcript, how can it be determined whether this unannounced entry and conversation was prejudicial?

whether the indictment should be dismissed. No other reported federal decision has considered this factor, and it is legally irrelevant. Once the grand jury's secrecy and independence have been violated, the invalidity of the resulting indictment does not depend on the practical effect upon, or convenience of, the prosecution. Moreover, in judging the potential consequences of dismissal, the court of appeals overlooked the fact that this was an investigatory grand jury, inquiring into many areas. Resubmission of relevant evidence to an untainted grand jury surely can be accomplished with dispatch. Consequently, dismissal of the indictment would not excessively disrupt the work of federal prosecutors or of the regular grand jury.

Conversely, it would be unfair to the petitioners and wasteful of federal judicial resources to demand that a trial be held before the question of grand jury intrusion is considered by this Court. If the grand jury proceeding were invalidated by the intrusions, the petitioners should not be forced to stand trial until there has been a proper grand jury proceeding. And, under the rationale of *United States* v. *Lill*, 511 F. Supp. 50, 61 (S.D.W. Va. 1980), the petitioners' claim, if valid now, may be lost after a long trial (*see* note 8 at 18, *supra*). That would obviously be unfair to the petitioners, who raised this issue at their earliest opportunity.

Finally, the court of appeals misunderstood and misapplied this Court's decision in *United States* v. *Morrison*, 449 U.S. 361 (1981), when it relied on the *Morrison* ruling as a basis for reversing the dismissal of the indictment. Pet. App. A at 6a, *infra*. This Court said in *Morrison* that dismissal of an indictment *with prejudice* is a "plainly inappropriate" remedy for the government's violation of an accused's Sixth Amendment right to the assistance of counsel. It held that the proper remedy "is limited to denying the prosecution the fruits of its transgression." 449 U.S. at 355-66.

In this situation, unlike that in *Morrison*, the prosecutors' transgression affected the integrity and validity of the grand

jury proceeding. The only way to deny the prosecution "the fruits of its transgression" is to require it to conduct a fresh proceeding before an untainted grand jury. The new grand jury proceeding is the equivalent of the new trials that were ordered in all the cases cited approvingly by this Court in its discussion of this point in its *Morrison* opinion (449 U.S. at 364-365): *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Geders* v. *United States*, 425 U.S. 80 (1976); *Herring* v. *New York*, 422 U.S. 853 (1975); *Powell* v. *Alabama*, 287 U.S. 45 (1932); *Black* v. *United States*, 385 U.S. 26 (1966); *O'Brien* v. *United States*, 386 U.S. 345 (1967). Dismissal of the indictment without prejudice is the only effective means of vindicating the important interest in preserving the secrecy of grand jury proceedings. *Compare Rose* v. *Mitchell*, 443 U.S. 545, 557-558 (1979); *Hill* v. *Texas*, 316 U.S. 400, 406 (1943).

The court of appeals failed to perceive that the dismissal of the indictment in *Morrison* had been "with prejudice" (449 U.S. at 363), and that in *Morrison* this Court disapproved a remedy which would forever foreclose the criminal prosecution of an accused merely because the government agents had interfered with the accused's constitutional right to the assistance of counsel. The remedy granted by the district court in this case would have no such "drastic" (449 U.S. at 367) effect. Instead, the district court's dismissal of the indictment *without prejudice* came within this Court's instruction (449 U.S. at 365):

> to identify and then neutralize the taint by tailoring relief appropriate in the circumstances. . . .

It is important for the administration of federal criminal justice throughout the country that this misapplication of the *Morrison* decision be corrected. It is also important that grand juries in the Fourth Circuit be subject to no different rules than grand juries elsewhere in the federal system. The *per se* rule of dismissal whenever there has been a violation of Rule 6(d)—surely applicable to repeated and unreprimanded violations of the Rule by persons under control of the prosecutor—requires reversal of the judgment of the court of appeals.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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October 27, 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-5053

PUBLISHED

UNITED STATES OF AMERICA,

Appellant,

v.

COMPUTER SCIENCES CORPORATION, JOHN W. LUKE, ERWIN L. ALLEN, THOMAS A. MARTI, NORMAN W. DERRICK, PETER C. LOUX, HERBERT G. BLECKER

Appellees.

No. 81-5099

UNITED STATES OF AMERICA,

Appellant,

v.

COMPUTER SCIENCES CORPORATION, JOHN W. LUKE, ERWIN L. ALLEN, THOMAS A. MARTI, NORMAN W. DERRICK, PETER C. LOUX, HERBERT G. BLECKER

Appellees.

Appeal From The United States District Court
For The Eastern District Of Virginia, At Alexandria.
Richard L. Williams, District Judge.

Argued January 7, 1982 Decided June 16, 1982

Before: MURNAGHAN and ERVIN, Circuit Judges, and WILKINS,* District Judge.

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*The Honorable William W. Wilkins, Jr., United States District Judge for the District of South Carolina, sitting by designation.

MURNAGHAN, Circuit Judge:

Resourceful lawyers representing criminal defendants often desire to be thorough and to overlook nothing in their commendable zeal to afford first-class representation. Consequently in many cases they tend to excess as the inundate us with a plethora of arguments, some good and some not so good. Sometimes one wonders whether such lack of selectivity is not counterproductive, for a party raising a point of little merit exposes himself to the risk of excessive discount for a better point because of the company it keeps.

The present case raises numerous issues, but, in fairness to counsel, it should be said that few, if any, of them are trivial or frivolous.

I. The Procedural Posture Of The Case

The case comes before us from a dismissal by the district court[1] of all fifty-seven counts in an indictment charging:

(a) conspiracy to participate in the affairs of an enterprise through a pattern of racketeering activity, 18 U.S.C. § 1962(c) and (d) (Count 1);

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[1] The opinion is reported as *United States* v. *Computer Sciences Corp.*, 511 F. Supp. 1125 (E.D. Va. 1981).

(b) the substantive offense of participating in the affairs of the enterprise through a pattern of racketeering activity, 18 U.S.C. § 1962(c) (Count 2);

(c) use and the investment of income received from a pattern of racketeering activity in the operation of an enterprise, 18 U.S.C. § 1962(a) (Count 3);

(d) defrauding the United States by overbilling the General Services Administration through causing checks drawn on the United States Treasury to be mailed, 18 U.S.C. § 1341 (Counts 4 through 27);

(e) defrauding the United States through overbilling of the GSA for computer services employing interstate wire transmissions, 18 U.S.C. § 1343 (Counts 28 through 37);

(f) bringing about the mailing of improperly inflated invoices to GSA, 18 U.S.C. § 1341 (Counts 38[2] through 43);

(g) causing the presentation of false claims to the United States Government for computer services, 18 U.S.C. § 287 (Counts 44 through 55);

(h) two additional charges of false claims to the United States Government, 18 U.S.C. § 287 (Counts 56 and 57).

Counts 1 and 2 charged all defendants. Count 3 charged Computer Sciences Corporation (CSC) alone. The defendants in Counts 4 and 5 were John W. Luke, Erwin L. Allen, and Thomas A. Marti. Counts 6 through 37 lay against CSC, Luke, Allen, Marti, and Norman W. Derrick. Counts 38 through 43 named as defendants CSC, Luke, Allen, Peter C. Loux, and Herbert G. Blecker. Counts 44 and 45 charged CSC, Luke, Allen, and Marti. Those charged under Counts 46 through 55

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[2] For an entirely independent reason not related to the issues disputed by the parties, namely a time-bar, the government consented to the dismissal of Count 38, and did not appeal the dismissal of that count.

were CSC, Luke, Allen, Marti, and Derrick. Counts 56 and 57 charged CSC, Luke, Allen, Loux, and Blecker.

Dismissal by the district court of the counts proceeded on two different bases. Counts 4 through 43 were dismissed for the reason that the mail fraud and wire fraud offenses charged, involving as they did fraud against the United States government, were precluded by the false claims statute which, upon enactment, had ousted any other statute which by its terms might proscribe the same offenses against the government. Consequently, on the theory on which the district judge was proceeding, the more general mail and wire fraud statutes, which were not yet even in existence, nevertheless anticipatorily were foreclosed and the false claims act became the only vehicle permitting prosecution of mail and wire fraud crimes against the government. The district judge contemplated that, absent a reversal on appeal, his decision would finally dispose of Counts 4 through 43.

The second dismissal theory applied to all fifty-seven counts, resting on the theory that the proceedings of the grand jury[3] had been contaminated through the unauthorized entry into the grand jury while that body was in session of persons to whom Fed. R. Crim. P. 6(d) did not grant the right to be present. That such an infringement of Rule 6(d) occurred is admitted by the government.

Additionally, insofar as defendant Derrick was concerned, the district judge dismissed Counts 1, 2, 6 through 37 and 46 through 55 against him with prejudice on the grounds of prosecutorial misconduct. Furthermore, the RICO counts (1 through 3) were dismissed for the reasons that (1) Infonet, an unincorporated division of a corporation (CSC), which was the enterprise charged in Counts 1 through 3 could not qualify as an "enterprise," since it lacked sufficient independent ex-

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[3] The grand jury investigation had a life of eighteen months during 1979 and 1980.

istence for that purpose; (2) there was no showing in the indictment of a benefit flowing from the racketeering activity to the Infonet Division; and (3) the dismissal on the substantive grounds of preemption by the false claims statute of the mail fraud and wire fraud charges reduced the predicate acts remaining to one, a bribery alleged but not prosecuted, being more than five years old and the statute of limitations having run. Therefore, ran the reasoning of the district judge, the quantity of predicate acts was insufficient to establish a pattern of racketeering activity.

The counts dismissed solely on grounds of impropriety in the conduct of the grand jury proceedings were not dismissed with prejudice, leaving it open to the government to seek reindictment through a new grand jury proceeding.

II. Disposition Of The Several Contentions Raised

A. The improper presence in the grand jury room of unauthorized persons.

A review of the record satisfies us that the invasions of the grand jury proceedings were rare, inadvertent and nonprejudicial to any defendant.[4] We do not mean to be taken as saying that those conclusions necessarily insulate an indictment and validate it in every case. Rather, each situation should be addressed on a *sui generis* basis. For a prosecution as to which the grand jury required only a day or two or a week or two to complete its investigation and to return an indictment, the posture in terms of frequency, inadvertence, and prejudice might differ, although the acts sullying the purity of grand jury

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[4] It is relevant to observe that no grand jury witness complained of the momentary intrusions. Diligent lawyers for the defendants first raised the point following review by them of grand jury transcripts. They were, howerver, unable to advance any basis for saying that the defendants were prejudiced, aside from the Rule 6(d) infraction itself.

proceedings were substantially like the ones with which we here concern ourselves.

In the course of grand jury investigation lasting eighteen months, intrusions by unauthorized persons occurred on five occasions. Duration of the entire proceedings is a significant measuring background when it comes to assessing the importance of specific interruptions. Each intrusion was brief, lasting no more than a minute or two. On two occasions, a Deputy U.S. Marshal came in the room, handed a document to the prosecutor leading the grand jury proceeding, leaving promptly after doing so. On a third occasion, the Marshal entered for a purpose not identified in the record and left immediately. An unidentified woman once entered, handed a document to the prosecutor and left. The final occasion occurred in the summer of 1979. Complaints had been made about the heat. Someone charged with the maintenance of the air conditioning equipment entered and interrupted the proceedings. He departed on being instructed by the prosectuor to leave the room inasmuch as the grand jury was in session. Each intrusion brought the proceedings to an abrupt halt, and no testimony was taken in the presence of the unauthorized persons.

On the record we are satisfied that this is a case "absent demonstrable prejudice or substantial threat thereof" so that "dismissal of the indictment is plainly inappropriate."[5] *United States* v. *Morrison*, 449 U.S. 361, 365 (1981). *Cf. United States* v. *Rath*, 406 F.2d 757 (6th Cir. 1969), *cert. denied*, 394 U.S. 920 (1969) ("A technical violation of Rule 6(d), Federal Rules of Criminal Procedure, occurred when an attorney who was a stranger to this action unintentionally interrupted the grand

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[5] One must bear in mind the long period of time over which the incidents were distributed and also must recognize that human life cannot be conducted on absolute principles. Mortals must accept and adjust to the substantial likelihood of occasional intermittent failures to attain and maintain perfection.

jury proceedings by entering the courtroom in which they were being conducted. The record establishes that the proceedings were halted at the moment of his entrance, and were not resumed during the fifteen to twenty second period of his presence. We hold that the interruption did not invalidate the proceedings or the indictment."). *See United States* v. *Kazonis*, 391 F. Supp. 804, 805 (D. Mass. 1975), *aff'd without opinion*, 530 F.2d 962 (1st Cir. 1976), *cert. denied*, 429 U.S. 826 (1976).

The case before us, in short, is one where there has been no intrusion of significant duration nor any showing of deliberate rule disregard by the government or prejudice to the defendant.[6] Life must go on. Attainable reality, not perfection, here

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[6] The existence of such considerations, including presence in the grand jury room of much greater duration, distinguishes other cases which have voided indictments. *Cf. United States* v. *Edgerton*, 80 F. 374 (D. Mont. 1897) (expert witness remained after testifying and asked questions of another witness); *Latham* v. *United States*, 226 F. 420 (5th Cir. 1915) (unauthorized person was present to record testimony throughout the grand jury proceeding); *United States* v. *Carper*, 116 F. Supp. 817 (D. D.C. 1953) (deputy marshals present throughout testimony of prisoner witnesses); *United States* v. *Borys*, 169 F. Supp. 366 (D. Alaska 1959) (mother of witness present throughout her testimony); *United States* v. *Bowdach*, 324 F. Supp. 123 (S.D. Fla. 1971) (FBI agent called upon by prosecutors to enter grand jury room to play a recording device during the testimony of a witness); *United States* v. *Daneals*, 370 F. Supp. 1289 (W.D. N.Y. 1974) (unauthorized agency regional counsel appeared and advised grand jury); *United States* v. *Braniff Airways, Inc.*, 428 F. Supp. 579, 589 (W.D. Tex. 1977) (unauthorized person present throughout as observer and assistant prosecutor); *United States* v. *Phillips Petroleum Co.*, 435 F. Supp. 610 (N.D. Okla. 1977) (unauthorized person was present throughout the testimony of a witness and conducted part of the questioning).

Any support afforded by *United States* v. *Furman*, 507 F. Supp. 848, 852-54 (D. Md. 1981), for the proposition that there is an in-

suffices. It is simply inappropriate to nullify grand jury work stretching out over a period of eighteen months because of technical, trivial, harmless violations of no significant duration of Fed. R. Crim. P. 6(d).

We should not be understood as commending the practice here. With the exception of the maintenance man, all of the intruders were apparently under the control of the prosecutors, who were obviously not diligent in keeping the sanctity of the grand jury room inviolate. Prosecutors should not consider what we have written as in any way amounting to an encouragement to depart from scrupulous compliance with Fed. R. Crim. P. 6(d). Having been fortunate enough to survive the attack here by the skin of their teeth on the basis of the record as a whole, they cannot count with any assurance on a similar conclusion on another record involving unauthorized grand jury room intrusions.

B. Dismissal of the mail fraud and wire fraud counts.

The trial court's approach involved a determination that there had existed a legislative intent, when Congress enacted 18 U.S.C. § 287, the statute outlawing false claims against the government, to make prosecution under 18 U.S.C. § 287 exclusive, and to preclude prosecution thereafter under the subsequently enacted mail fraud and wire fraud statutes for the same activities even though they might, viewed without regard to 18 U.S.C. § 287, meet the description of the crimes of

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flexible requirement that an unauthorized presence in the grand jury room mandates dismissal of the indictment (there an excused grand juror who was unaware of her change in status participated in a day's proceedings) is dissipated by the reversal in *United States* v. *Furman*, 4th Cir. 1981, 81-5067 (unpublished). The reversal rested on the conclusion that Fed. R. Crim. P. 6(b), rather than Rule 6(d), applied.

mail and wire fraud.[7] The mail fraud statute, 18 U.S.C. § 1341,[8] was originally enacted in 1872, the wire fraud statute, 18 U.S.C. § 1343,[9] in 1952.

The statute punishing false claims against the United States began its life in 1863,[10] was reenacted as part of a comprehen-

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[7] An implication of the district court's rationale is that, even if 18 U.S.C. § 287 were, for some reason, ruled invalid or inapplicable, or if it were repealed, there could still be no mail fraud or wire fraud prosecution, where the government is the defrauded person, although all the requirements spelled out in the mail and wire fraud statutes would be fully satisfied.

[8] Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or any thing represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[9] Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[10] Since the mail fraud and wire fraud statutes did not exist in 1863, it requires a great stretch of imagination to attribute an intent to Congress in 1863 prospectively to render inapplicable to frauds against the government any statute which might later be enacted by a subsequent Congress or Congresses.

sive revision of the Criminal Code in 1909, and in 1948 was divided into two parts. One of the parts became 18 U.S.C. § 287,[11] which makes it criminal to present false claims against the government. The other part, which punishes false statements to the government, was codified as 18 U.S.C. § 1001.[12]

Perusal of the false claims statute, on the one hand, and of the mail fraud and wire fraud statutes, on the other, discloses no language suggesting mutual exclusivity insofar as prosecution is concerned. The district court placed great reliance on the cases of *Simpson* v. *United States*, 435 U.S. 6 (1978), and *Busic* v. *United States*, 446 U.S. 398 (1980). However, those cases dealt with situations where a statute includes within its language its own enhanced punishment provisions (for example, bank robbery with a dangerous weapon has an enhanced punishment as compared to bank robbery alone). Since the particular statute controls and rules out the more general, those cases reach the sensible result that a general enhancement statute (applying to all crimes involving use of firearms) is ineffective as a second enhancer.

Here, however, we have the situation not at all uncommon, as the case is of *Blockburger* v. *United States*, 284 U.S. 299 (1932), and its numerous close relatives, demonstrate, of more than one statute infringed by a single act or combination of

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[11] Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[12] Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

acts. Dismissal by the district judge of the indictment as to the counts charging wire fraud and mail fraud occurred at a very early stage of the case, before the taking of any evidence and, of course, before any adjudication of guilt. It will be time enough to determine whether the *Blockburger* test, calling for a restriction to a single *punishment*, applies if and when the time should ever arrive when the defendants or some of them are found guilty both of wire fraud or mail fraud, on the one hand, and of false claims against the United States, on the other. Whatever the answer to that question may be, however, it does not relate to the right of the government to prosecute under both a wire fraud or mail fraud statute and the false claims statute. Guilt and punishment are two distinct and separate considerations. Finding nothing in the statutory language itself or in the legislative history of the wire fraud, mail fraud and false claims statutes to require a determination that prosecution under one must be at the expense of prosecuting under the other, or any evidence of an intent to withdraw from one statute a coverage it obviously has standing alone because of a coverage also afforded by another statute,[13] we conclude

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[13] *Cf. United States* v. *Weatherspoon*, 581 F.2d 595, 599-600 (7th Cir. 1978) ("[T]here is nothing in either the language or the legislative history of the false statements statute, 18 U.S.C. § 1001, reflecting any Congressional intent to create a hierarchy of sanctions that would preempt the application of the mail fraud statute, 18 U.S.C. § 1341, to the submission of false statements to a government agency through the use of the mails . . . . We hold that, by using the mails to submit false statements to a government agency, Weatherspoon subjected herself to separate prosecution and punishment under both the mail fraud and false statements statutes."); *contra United States* v. *Henderson*, 386 F. Supp. 1048 (S.D. N.Y. 1974). The holding in *Henderson* was flatly rejected in *United States* v. *Miller*, 545 F.2d 1204, 1216 n.17 (9th Cir. 1976), *cert. denied*, 430 U.S. 930 (1977), which lists several cases inconsistent with *Henderson*. It was questioned by its own Circuit, *United States* v. *Morgan*, 575 F.2d 32, 49, text at n.21 (2d Cir. 1978), *cert. denied*, 439 U.S. 931 (1978). *See also United States* v. *Shermetaro*, 625 F.2d 104, 111 (6th Cir. 1980).

that dismissal of the wire fraud and mail fraud charges was in error.[14]

In a recent, related case, *United States* v. *Blecker*, 657 F.2d 629, 636 (4th Cir. 1981), *cert. denied*, ___ U.S. ___, 102 S. Ct. 1016 (1982), we had occasion to make an observation also pertinent here: "[Defendants'] argument, however, is premised on a construction of the scope of the mail fraud statute that is far too narrow."

C. The claim of prosecutorial misconduct with respect to defendant Derrick.

The action of the district court in dismissing counts 1, 2, 6 through 37 and 46 through 55 with prejudice insofar as Derrick was concerned proceeded from the conclusion that the prosecutors overreached to his severe prejudice. We read the record otherwise. As part of the investigation by the government, the defendants, particularly the principal corporate defendant CSC, cooperatively supplied records. Derrick was assigned the responsibility of assembling the records in order to meet a subpoena issued against CSC. Supposedly the government engaged in "dirty tricks" by permitting Derrick to testify

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[14] We pass rapidly over the contention that dismissal of the wire fraud counts was proper in the absence of allegations that the wire transmissions themselves were false or fraudulent. It is well recognized that the wire fraud statute, patterned on the mail fraud act, was meant to receive like interpretation. *United States* v. *Tarnopol*, 561 F.2d 466, 475 (3d Cir. 1977); *United States* v. *Donahue*, 539 F.2d 1131, 1135 (8th Cir. 1976). It is also well recognized that innocence in a mailing, the consideration that a mailing was absent criminal intent, (does not insulate from mail fraud prosecution if the mailing) was a step in the fraudulent path. *Badders* v. *United States*, 240 U.S. 391, 394 (1916); *United States* v. *Blecker*, 657 F.2d 629, 637 (4th Cir. 1981), *cert. denied*, ___ U.S. ___, 102 S. Ct. 1016 (1982); *United States* v. *Caldwell*, 544 F.2d 691, 696 (4th Cir. 1976).

before the grand jury without prior warning that he was a target of the investigation.

General counsel for CSC had asked early in the investigation that all grand jury subpoenas for CSC records and for the testimony of CSC employees be finalized through him. General counsel called on Derrick to assemble the documents and to inform government counsel and other personnel as to various subpoena aspects. Derrick was informed by general counsel that he was "expected to cooperate fully with the government's investigation." Pursuant to the instructions of general counsel, Derrick met several times with government counsel and on March 5, 1980 responded to a grand jury subpoena and testified. Except for a telephone conversation with government personnel about a subpoena to CSC which was issued about one month after his testimony, Derrick had no further contacts with the government's personnel. In October 1980, six months later, Derrick's indictment took place.

The government has convincingly established that only towards the end of the investigation, following analysis of voluminous records, did the government reach a conclusion that indictment of Derrick was merited. The government has demonstrated that Derrick was not a target of the investigation at the time he testified in March, 1980. The district judge made no finding to the contrary. On those grounds alone we are satisfied that dismissal against Derrick was not warranted at all, let alone dismissal with prejudice.

It is, therefore, unnecessary that we consider further contentions to the effect that, even had Derrick been a target when he appeared before the grand jury, the government was not required to alert him of his exposed position. *See United States* v. *Washington*, 431 U.S. 181 (1977). Nor do we undertake to ascertain the strength or weakness of the government's contention that the warnings given to Derrick prior to his March 5, 1980 appearance before the grand jury, although they did not expressly allude to his "target" status, nevertheless, sufficed to warn him of his Fifth Amendment rights.

The district judge rested his determination that the counts naming Derrick as a defendant should be dismissed with prejudice in large part on the following finding of fact:

> In the months following [Derrick's] appearance before the grand jury and the handing down of the indictment he still spent about 50 percent of his time assisting the prosecution with documents and their other needs and at no time did he ever appear to have been warned or in any way alerted to the fact that he was walking with the enemy and that everything he might be doing would ultimately come back to haunt him.

However, in the period following his appearance before the grand jury, his efforts to assemble documents and other information were attributable to compliance by him with the direction of CSC, given for the corporate purposes of CSC. The records produced by Derrick's efforts after all belonged to the corporation and Derrick consequently had no Fifth Amendment privilege with respect to them. *E.g. Bellis* v. *United States*, 417 U.S. 85, 88-92 (1974); *United States* v. *White*, 322 U.S. 694 (1944); *Wilson* v. *United States*, 221 U.S. 361 (1911); *Dreier* v. *United States*, 221 U.S. 394 (1911).

Finally, of course, even had violation of Fifth Amendment rights occurred, the proper sanction would not be the total dismissal with prejudice of the pertinent counts of the indictment. Suppression at trial of any materials obtained through violations of his Fifth Amendment rights would suffice. *See United States* v. *Blue*, 384 U.S. 251, 255 (1966) ("Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.").

D. The counts under the RICO statute.

Here we confront the most troublesome point raised by the defendants in their successful assault below on the fifty-seven counts making up the indictment. The factual situation presents one claim of an alleged bribery occurring outside the period of limitations and, therefore, not subject to prosecution together with the several charges of wire fraud and mail fraud. The list of crimes which may be considered in determining whether the two predicate offenses necessary to make out a RICO offense have been alleged does not extend to false claims under 18 U.S.C. § 287.

We entertain some doubt that Congress ever contemplated the extension of the RICO statute to include a situation where one of the predicate offenses, separated in character and by a long time period, could combine with a set of closely related wire fraud and mail fraud claims essentially representing subdivisions of a single on-going illegal act to meet the predicate requirements of so serious a statute. The defendants do not immediately appear to fit a category against whom the act was generally considered to be directed. It would be tempting indeed to conclude that, although the act does include mail fraud and wire fraud among possible predicate offenses, nevertheless the omission from that category of the false claims statute, combined with the consideration relied on by the district judge in another context, namely, the apparent complete overlap under the facts the government expects to prove between the false claims statute and the wire fraud and mail fraud acts, evidenced a congressional intent to foreclose consideration of the putative wire fraud and mail fraud offenses for RICO purposes.

That approach would reduce the matter to one involving but a single predicate offense and, therefore, render RICO inapplicable. However, the approach, tempting as it is, is not at all appropriate in the present stage of the proceedings. We cannot presently tell for certain how the prosecution may develop. Nothing in the RICO act clearly precludes the prosecutions

here, the indictments having been carefully tailored, technically at least, to meet the requirements of the RICO act. If legislatively mandated limitations on RICO's applicability of the sort alluded to above are to be ascribed to Congress, it should not happen in a vacuum but rather only after a fully developed factual record has been made and the necessary precondition to a real determination, namely, a conviction, is before us.

The district court was also impressed with an argument which we find unsound insofar as the thrust of the RICO act is concerned. The RICO "enterprise" was identified in the indictment as the Infonet Division of CSC, an organization which had no corporate existence separate and apart from that of CSC itself. The district judge took the position that the Infonet Division could not qualify as an enterprise in view of its corporate non-status.[15] However, 18 U.S.C. § 1961(4) defines "enterprise" as follows:

> "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

Possession of the characteristics of a legal entity hence is not necessary to make out an "enterprise." At the very least, Infonet, having a substantial number of CSC employees working within the grouping or division known by its name, constitutes a "group of individuals associated in fact although not a legal entity."

Nor are we impressed by the contention that Infonet could not be an "enterprise" because it could not be treated as a "person," defined in 18 U.S.C. § 1961(3) as an individual or

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[15] For a similar approach taken in the analogous circumstances of Sherman Act conspiracies, *see* M. Handler and T. A. Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo L. Rev. 23 (1981).

entity capable of holding a legal or beneficial interest in property. We may assume that a corporate division may not take formal legal title to property, but beneficial, informal rights assigned by the corporation to the division to assist in the conduct of its affairs appear to constitute informal beneficial interests. We may also assume that Infonet, not being an individual, and "not a legal entity" cannot be a "person" for RICO purposes. Nevertheless, nothing in the statute requires that an "enterprise" be a "person." The use of the word "person" in 18 U.S.C. § 1962 is confined to identification of whoever is charged with "prohibited activities." Counts 1 through 3 of the indictment do not name Infonet as a defendant. Those named are all individuals or CSC, a corporate entity.

There is, however, the remaining problem, restricted to CSC, of whether Congress ever intended, in 18 U.S.C. § 1962, that the statute prohibit activities by a person where the activities are described as occurring with any enterprise when there was identity between the person, on the one hand, and the enterprise, on the other. We conclude that "enterprise" was meant to refer to a being different from, not the same as or part of, the person whose behavior the act was designed to prohibit, and, failing that, to punish. To be sure, the analogy between individuals and fictive persons such as corporations is not exact. Still, we would not take seriously, in the absence, at least, of very explicit statutory language, an assertion that a defendant could conspire with his right arm, which held, aimed and fired the fatal weapon. A corporation, in common parlance, is not regarded as distinct from its unincorporated divisions either. Bearing in mind that lenity applies even in RICO cases, *United States* v. *Anderson*, 626 F.2d 1358, 1370 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981), we have decided that Counts 1 through 3 were properly dismissed, with prejudice, as to CSC. Counts 1 and 2 alleged participation in the affairs of an enterprise, namely the Infonet division. Count 3 alleged use and investment of racketeering income in the operation of the Infonet division, an enterprise. Nevertheless, Counts 1 and 2,

inasmuch as they charged individual defendants as well as CSC, remain outstanding as to all save CSC.[16]

The contention that the enterprise, the Infonet Division, was not benefitted or advanced by the racketeering activity arose, of course, from the unfortunate, inexact language in the opinion in *United States* v. *Webster*, 639 F.2d 174 (4th Cir. 1981), *cert. denied*, ___ U.S. ___, 102 S. Ct. 307 (1981). Subsequently, the language "benefitted or advanced" was disavowed following rehearing. *United States* v. *Webster*, ___ F.2d ___ (4th Cir. 1982), No. 79-5204, etc. slip op. at 4-5. Since that consideration alone eliminates the support for defendants' position with respect to Counts 1 and 2, it makes unnecessary any discussion of the further government claim that it should, at any rate, not suffer dismissal of the indictment but be permitted to prove at trial that the affairs of the Infonet Division had in fact been benefitted or advanced through the racketeering activity.

For all the foregoing reasons, the decision below is reversed and the case is remanded with directions to reinstate each of the fifty-five counts (Counts 1 and 2, 4 through 37, and 39 through 57). Count 3 should remain dismissed with prejudice, as should the dismissal as against CSC of Counts 1 and 2. Count 38, the dismissal of which the government has not appealed, should, also, not be exhumed.

REVERSED AND REMANDED.

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[16] Count 3 named only CSC, and so was properly dismissed *in toto*.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-5053

UNITED STATES OF AMERICA,

Appellant,

versus

COMPUTER SCIENCES CORP., *et al,*

Appellees.

No. 81-5099

UNITED STATES OF AMERICA,

Appellant,

versus

COMPUTER SCIENCES CORP., *et al.*

Appellees.

ORDER

FILED
Sept 27 1982
U.S. Court of Appeals
Fourth Circuit

Upon consideration of the appellant's petition for rehearing, and the appellees' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petitions for rehearing are DENIED.

Entered at the direction of Judge Murnaghan, with the concurrence of Judge Ervin and Judge Wilkins (U.S.D.J.).

For the Court,

/s/ William K. Slate, II
CLERK
WILLIAM K. SLATE, II

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CRIMINAL NO. 80-158-A

UNITED STATES OF AMERICA

v.

COMPUTER SCIENCES CORP., *et al.*

Defendants.

FILED
Mar 5 1981
CLERK U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

ORDER

On the various motions heretofore filed by the parties herein, it is ORDERED that:

1. All Defendants' Motion to Dismiss the Indictment on the Grounds of Prosecutorial Misconduct filed on November 25, 1980 is denied as to the defendants CSC, Marti, Luke, Loux, Blecker and Allen for the reasons given in a bench ruling on February 13, 1981. For further reasons given by the court in a bench ruling on February 13, 1981, the defendant Derrick's Motion to Dismiss the Indictment on the Grounds of Prosecutorial Misconduct is granted. The indictment as to defendant Derrick is dismissed with prejudice.

2. All Defendants' Motion to Strike Portions of Paragraph 4, Count 2 of the Indictment filed on November 25, 1980 is moot for the reasons given in a bench ruling on January 7, 1981 on Counts 1 through 43 and for the additional reasons set forth in the accompanying Memorandum regarding the invasion of the grand jury by intruders.

3. The Motion of the United States for an Order in Limine regarding the provisions of the National Teleprocessing Services Contract filed November 25, 1980 is moot for the reasons given in a bench ruling on January 7, 1981 and for the additional reasons set forth in the accompanying Memorandum regarding the invasion of the grand jury by intruders.

4. The Motion of the United States for an Order in Limine regarding evidentiary matters filed December 11, 1980 is moot for the reasons given in a bench ruling on January 7, 1981 and for the additional reasons set forth in the accompanying Memorandum regarding the invasion of the grand jury by intruders.

5. Allen's Motion for Access to Jenks Act Statements of Parker filed November 25, 1980 is denied for the reasons given in a bench ruling on January 7, 1981.

6. Allen's Motion to Exclude Evidence of Privileged Communications filed November 25, 1980, and Allen's, CSC's and Luke's Motion to Suppress Evidence Subject to Attorney-Client Privilege filed February 5, 1981 are denied for the reasons given in a bench ruling on February 13, 1981.

7. Marti's and Derrick's Motion to Dismiss Counts 1 and 2 for Duplicity and Misjoinder filed November 25, 1980 is moot for reasons set forth in a bench ruling on January 7, 1981 and for the additional reasons set forth in the accompanying Memorandum regarding the invasion of the grand jury by intruders.

8. Loux's and Blecker's Motion to Sever filed November 25, 1980 is denied to the extent not mooted for reasons set forth in a bench ruling on January 7, 1981 and for the additional reasons set forth in the accompanying Memorandum regarding the invasion of the grand jury by intruders.

9. Luke's, Allen's, Marti's and Derrick's Motion for a Change of Venue filed November 25, 1980 is denied to the extent not mooted for the reasons given in a bench ruling on January 7, 1981 and for the additional reasons set forth in the

accompanying Memorandum regarding the invasion of the grand jury by intruders.

10. Marti's and Luke's Motion for a Continuance filed November 25, 1980 is denied to the extent not mooted by this court's rulings regarding Counts 1 through 43 of the Indictment and for the additional reasons set forth in the accompanying Memorandum regarding the invasion of the grand jury by intruders.

11. The Defendants' Motion to Dismiss the Indictment filed November 25, 1980 is granted to the extent that the first 43 counts are dismissed with prejudice, but denied to the extent that Counts 44 through 57 are not dismissed with prejudice for the reasons set forth in the accompanying Memorandum.

12. The Motions of defendants Loux and Blecker to Dismiss the Indictment on the Grounds of Collateral Estoppel and on the Grounds of Prosecutorial Vindictiveness filed November 25, 1980 are denied for the reasons set forth in the accompanying Memorandum.

13. The Motion of All Defendants to Dismiss the Indictment on the Grounds that the Grand Jury was not Fully Informed filed November 25, 1980 is denied for the reasons set forth in the accompanying Memorandum.

14. The Motion filed on behalf of All Defendants to Dismiss the Indictment on the Grounds that the Jury Selection Procedure is Invalid filed on November 25, 1980 is denied for the reasons set forth in the accompanying Memorandum.

15. The Motion filed on behalf of All Defendants to Dismiss the Indictment on the Grounds that Unauthorized Persons Invaded the Secrecy of the Grand Jury filed January 28, 1981 is granted without prejudice for the reasons set forth in the accompanying Memorandum.

The Clerk is instructed to mail a copy of this Order and the accompanying Memorandum to all counsel of record.

/s/ Richard L. Williams
United States District Judge
RICHARD L. WILLIAMS

Date: March 5, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CRIMINAL NO. 80-158-A

UNITED STATES OF AMERICA

v.

COMPUTER SCIENCES CORP., *et al.*

Defendants.

MEMORANDUM OPINION

This criminal action against a major domestic corporation and six individual defendants is before the court on the following pretrial motions:

DATE FILED	MOTION
November 25, 1980	All Defendants' Motion to Dismiss the Indictment on Grounds That RICO, Mail Fraud and Wire Fraud Allegations as Well as Allegations Regarding the Contract are Improper
November 25, 1980	Blecker's and Loux's Motion to Dismiss the Indictment on Grounds of Collateral Estoppel
November 25, 1980	Blecker's and Loux's Motion to Dismiss the Indictment as Against the Defendants for Prosecutorial Vindictiveness
November 25, 1980	All Defendants' Motion to Dismiss the Indictment on the Grounds That the Grand Jury was Not Fully Informed
November 25, 1980	All Defendants' Motion to Dismiss the Indictment on the Grounds That the Grand Jury was Not Properly Selected

January 28, 1981	All Defendants' Motion to Dismiss the Indictment on the Grounds That Unauthorized Persons Invaded the Secrecy of the Grand Jury Proceedings
February 26, 1981	All Defendants' Motion for Disclosure of Grand Jury Testimony

These motions were accompanied by voluminous briefs, affidavits and supporting documents. The government responded with voluminous briefs and affidavits. The court set certain of the motions for argument on January 6th and 7th, 1981. Arguments on the remaining motions were set for January 14th and 16th, 1981. As a result of the latter hearings, the court ordered an evidentiary hearing on February 10th and 11th, 1981. This Memorandum Opinion addresses each of these motions.

The 27-page indictment in this prosecution was returned by the grand jury on October 8, 1980. It contains 57 counts against defendants Computer Sciences Corporation ("CSC") and against CSC employees John W. Luke, Norman W. Derrick, Thomas A. Marti, Peter Loux; a former CSC employee, Erwin L. Allen; and against the president of Icarus Corporation, Herbert G. Blecker.

In the first three counts, the indictment charges violation of the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1981 et seq. ("RICO"). Count 1 charges a § 1962(d) RICO conspiracy against all of the defendants. Count 2 charges a violation of § 1962(d) against all defendants; that is, conducting an enterprise through a pattern of racketeering activity. Count 3 charges a violation of § 1962(a), investing and using income derived from a pattern of racketeering activity in an enterprise, against CSC only.

Counts 4 through 27 charge various acts of mail fraud against defendants CSC, Luke, Allen, Marti and Derrick. Counts 28 through 37 charge wire fraud against defendants CSC, Luke, Allen, Marti and Derrick. Counts 38 through 43 charge mail

fraud against defendants CSC, Luke, Allen, Loux and Blecker. The conduct charged in Counts 4 through 43 is incorporated in the first three counts as a part of the pattern of racketeering engaged in by the defendants.

Counts 44 through 55 charge defendants CSC, Luke, Allen, Marti and in most instances Derrick with presenting false claims to the United States Government. Counts 56 and 57 charge False Claims Act violations against defendants CSC, Luke, Allen, Loux and Blecker.

The allegations in these charges concern the acquisition of the National Teleprocessing System ("NTS") contract by CSC and billing for computer services rendered under the contract by the Infonet Division of CSC. Regarding the acquisition of the contract, it is alleged that Luke bribed a GSA contracting officer in order to obtain the NTS contract. In addition, it is charged that the defendants overbilled the government for Systems Resource Units ("SRU's") and for computer software packages.

The motions listed above challenge the indictment on a number of grounds. First, the defendants allege that Counts 1 through 43 must be dismissed because the facts alleged do not sustain a charge under RICO or under the mail and wire fraud statutes. They allege that Counts 1 through 3 must be dismissed for failure to state a claim under RICO and because each RICO count is improperly based upon a time-barred bribery allegation. In addition, they allege that the first three counts of the indictment must be dismissed because RICO cannot constitutionally be applied to the facts here alleged. Further, defendants allege that Counts 2, 3 and 4 through 43 should be dismissed for multiplicity. Defendants also allege that Counts 1 through 3 are defective as they do not apprise the defendants of the extent of property subject to forfeiture under RICO.

The defendants also allege that the indictment should be dismissed in its entirety under the recent Fourth Circuit decision in *United States* v. *Race, et al.*, No. 78-5140 (4th Cir.,

September 25, 1980), the conduct alleged in the indictment as fraudulent is authorized by a reasonable interpretation of the contract.

In addition, the defendants move to dismiss on grounds that the grand jury was not fully informed due to the technical nature of the indictment and that the grand jury was selected in violation of the United States Constitution and laws.

Defendants Loux and Blecker move to dismiss on grounds that the issue of whether there was a conspiracy against the government by them was resolved in an earlier proceeding and collateral estoppel bars the assertion here. In addition, defendants Loux and Blecker move to dismiss on grounds of prosecutorial vindictiveness.

All of the defendants move to dismiss on grounds of prosecutorial misconduct and on grounds that the secrecy of the grand jury was invaded by unauthorized persons.

I.

RICO COUNTS

A. *Counts 1 - 3*

The defendants are charged in Counts 1 through 3 with violating several of the provisions of the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, et seq. ("RICO"). Count 1 charges all defendants with a conspiracy to conduct the affairs of CSC's unincorporated "Infonet" Division "through a pattern of racketeering activity" in violation of 18 U.S.C. § 1962(d). Count 2 charges the defendants with actually conducting the affairs of the Infonet Division "through a pattern of racketeering activity" by bribery, mail fraud and wire fraud, in violation of § 1961(c) and § 2. That count also claims a violation of § 1963, although that section is a recitation of criminal penalties for violation of § 1962. Count 3 alleges that CSC received income from the alleged pattern of racketeering activities and invested that income in the opera-

tion of the Infonet Division, making that investment subject to forfeiture to the United States pursuant to § 1963(a).

The conspiracy alleged in Count 1 was to violate 18 U.S.C. § 1962(c), which provides that

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in conduct of such enterprise's affairs through a pattern of racketeering activity. . . .

In order to understand exactly what it is that § 1962(c) makes unlawful it is necessary to set forth several of the definitions provided in § 1961. The most important and detailed is the definition of "racketeering activity." Section 1961(1) defines it as

> (A) Any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) Any act which is indictable under any of the following provisions of Title 18, United States Code:

The sections listed are ones relating to, *inter alia*, bribery, mail fraud and wire fraud.

A "person" is defined as "any individual or entity capable of holding a legal or beneficial interest in property." Section 1961(3). An "enterprise" is "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." Section 1961(4).

A "pattern of racketeering activity" is defined as:

> At least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

§ 1961(5).

Count 1 alleges that the defendants CSC and Luke bribed a GSA contracting officer by employing him after making sure CSC was awarded the NTS contract. The alleged bribery occurred in 1971 or 1972, and, standing alone, would be barred by the statute of limitations.[1] 18 U.S.C. § 3282. It is the government's contention, however, that despite this bar the bribery can be used to meet the definition of § 1961(5) for a "pattern of racketeering activity."

Count 1 also alleges that CSC and co-defendants Luke, Allen, Marti and Derrick conspired to commit mail fraud against the government by purposely overbilling the government under the contract through a scheme designed to confuse the government as to how much would be charged for each "system resource unit"—the measure used to charge for computer use. The indictment also alleges that these defendants altered the method of calculating these system resource units to increase the charges to the government, and that they fraudulently increased the cost of the software package sold under the contract. The mail fraud theory was that by these means the defendants conspired to cause the government to send checks through the mails to pay for computer use under the contract. Wire fraud conspiracy was alleged under the theory that the computer signals were transmitted over interstate wires, and that these signals were to be the basis for the overbillings.

CSC, Luke, Allen, Loux and Blecker were alleged to have also conspired to increase fraudulently the cost of the software by fifty percent by falsely claiming that a new package was an improvement over the old one. The indictment alleged that this was a conspiracy to commit mail fraud because the invoices and checks were sent through the mails, and to commit wire fraud on the theory again that the overbillings were to be based on computer signals sent over interstate wires.

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[1] The indictment was returned by the grand jury on October 8, 1980.

Count 2 charges the substantive offenses on which the Count 1 conspiracy was based and Count 3 sets forth the investment into Infonet and the forfeiture allegation.

A. The Enterprise

One of the things which separates a RICO charge from the predicate acts which underlie the charge is the conducting of an "enterprise" through a pattern of racketeering activities. By charging CSC with the RICO counts the indictment alleges that CSC conspired with the co-defendants and did operate its own Infonet Division through a pattern of racketeering.

As has been often written,[2] one of the main goals of RICO was to counter organized criminal elements in their attempt to infiltrate legitimate businesses.[3] In passing the Act, Congress found that organized crime in this country

> Is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption. . . . [and that illegally obtained funds] are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes. . . .

Pub. L. 91-452, § 1.

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[2] *See, e.g.*, 116 Cong. Rec. 18939 (1970) (remarks of Sen. McClellan); Pub. L. 91-452, § 1, 84 Stat. 922, *reprinted in* [1970] U.S. Code, Cong. & Ad. News 1073; *United States* v. *Whitehead*, 618 F.2d 523, 525 n. 1 (4th Cir. 1980); Note, 65 Va. L. Rev. 109, 109 (1979).

[3] This court does not claim that for RICO to be invoked outside forces must infiltrate an otherwise unadulterated business activity. The Fourth Circuit has written that RICO "is not so limited, and that its prohibitions apply to the use of racketeering activities to promote any enterprise affecting interstate commerce." *United States* v. *Whitehead*, 618 F.2d 523, 525, n. 1 (4th Cir. 1980). *See also United States* v. *Mandell*, 591 F.2d 1347, 1375 (4th Cir. 1979).

To fight against this evil, RICO provides for stiff penalties upon conviction[4] and for forfeiture of any interest acquired in an enterprise from a pattern of racketeering activity.[5]

With both the congressional purpose and the definition of "enterprise" in mind, this court must determine whether the Infonet Division is an enterprise for purposes of RICO — for without an "enterprise" there can be no RICO violations.

It is the opinion of this court that the Infonet Division cannot be an enterprise as far as CSC is concerned. Infonet has no legal existence separate and apart from CSC, being only one of several of CSC's unincorporated divisions. Although Infonet had its own officers (for example, defendant Luke was its president) it served only an organizational purpose in practice.

An unincorporated "division of a corporation is not a separate entity, but is the corporation itself." *In Re Sugar Industry Antitrust Litigation*, 579 F.2d 13 (3rd Cir. 1978). *See also, Western Beef, Inc.* v. *Compton Investment Co.*, 611 F.2d 587 (5th Cir. 1980). It is clear, then, that the Infonet Division is not "an individual, partnership, corporation, association, or other legal entity." At *most*, the division is "a group of individuals associated in fact although not a legal entity." However, even if it is such a group of individuals associated in fact, CSC, by definition, could not be included in this association. Section 1961(3) defines "person" as "any individual or entity capable of holding a legal or beneficial interest in property." It is clear from this definition that "individual" is used differently from "person" in the act to connote a living person.

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[4] 18 U.S.C. § 1963(a) provides that for violating § 1962 a person can be fined up to $25,000 and imprisoned for up to 20 years or both and shall forfeit to the government any interest acquired or maintained in violation of § 1962 and any interest in, security of, claim against or property or contractual right providing a source of influence over the enterprise which the person has established in violation of § 1962.

[5] See footnote 5.

Therefore, because Infonet cannot supply the enterprise element — at least as far as CSC is concerned — Counts 1, 2, and 3 must be dismissed as to CSC. No authority has been found on the question of whether the rejection of the enterprise element for one co-defendant requires the rejection of the alleged enterprise for the other defendants. This court, however, believes logic dictates that in order to meet his burden of proof, the prosecutor must show that co-defendants charged under RICO were operating the same enterprise through a pattern of racketeering activity. Allowing the definition of the enterprise to shift for each co-defendant would make the enterprise element more of an intellectual exercise for ingenious prosecutors than a critical element in the offense — as element essential to carrying out Congress's purpose. Therefore, it is this court's opinion that for this reason the RICO counts must be dismissed, although, as the discussion below demonstrates, this is by no means the sole reason for dismissal of these counts.

B. Through A Pattern Of Racketeering Activity

Even assuming that Infonet could constitute an enterprise — either as an entity or as a group of individuals associated in fact — it is still essential that the enterprise be conducted "through a pattern of racketeering activity." This means the enterprise must have "its affairs advanced or benefitted in some fashion, direct or indirect. . . ." *United States* v. *Webster, et al.*, slip op. 4th Cir., January 15, 1981 (No. 79-5204). If the enterprise alleged in the indictment had been CSC, the enterprise element would be less of a problem. But the indictment claims the unincorporated, non-legal Infonet Division is the enterprise — no doubt because the government sought to include CSC as a defendant. The pattern of racketeering alleged by the government, if it advanced or benefitted any entity, it advanced CSC. The alleged misrepresentations regarding the software were made by CSC, not Infonet. All of Infonet's assets were owned by CSC, and any money paid under the NTS contract in no way benefitted or advanced Infonet separate and apart from the overall advancement of

CSC as a whole. When looked at in this light it becomes clear that Infonet could not have been conducted "through a pattern of racketeering activity."

C. Mail Fraud

In addition to the time-barred bribery allegation, the predicate acts on which the government relied to support the "pattern of racketeering activity" charge are the mail and wire fraud charges. Besides supporting the three RICO counts, these allegations are substantively charged in Counts 4 through 43.

The basis for the alleged mail fraud is that the defendants submitted false claims to the government by sending invoices through the mail and were paid by the government with checks sent by mail. The wire fraud is based solely on the fact that the service provided by CSC was delivered over the interstate wires. Counts 44 through 57 charge the defendants specifically under the false claims statute, 18 U.S.C. § 287.

The mail fraud counts are, in essence, false claims with the supposed addition of the use of the mails as an artifice to defraud. The government claims in Counts 4 through 27 that all of the defendants except for Blecker and Loux

> for the purpose of executing [a] . . . scheme and artifice to defraud, did knowingly cause to be delivered by mail through the Postal Service . . . mail, matter and things, to wit: a check or checks drawn on the Treasury of the United States addressed to Computer Sciences Corporation. . . .

These checks were drawn for the purpose of paying CSC for computer services under the contract. The charges in Counts 30 through 43 include mailing of invoices for the alleged software fraud.

The mail fraud statute, 18 U.S.C. § 1341, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, and for obtaining money or property by means of false or fraudulent pretenses,

> representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any Post Office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

The offense has been called a "stopgap device" to be used "until particularized legislation can be developed and passed to deal directly" with a "new" type of fraud. *United States* v. *Maze*, 414 U.S. 395, 406, 94 S. Ct. 645, 651, 38 L.Ed.2d 603, 611 (1974) (Burger, C. J., dissenting). One district court added to this description to say that the mail fraud statute "was to protect the public; more precisely, the gullible public, against the various fraudulent schemes that the cunning trickster could devise." *United States* v. *Henderson*, 386 F. Supp. 1048 (S.D.N.Y. 1974).[6]

The false claims statute provides:

> Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 287.

It is clear that the government can elect to charge a defendant under one or more statutes for a single offense if that

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[6] Defendants have cited *Henderson* for its holding that the mail fraud provisions are not to be applied when the supposedly defrauded victim is the United States government. This court has decided that it need not reach this issue in light of its disposition of the case.

offense overlaps more than one statute. *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L.Ed. 306, 309 (1932); *United States* v. *Crew, et al.*, 538 F.2d 575, (4th Cir. 1976); *United States* v. *Ponder*, 522 F.2d 941 (4th Cir. 1975); *Coates* v. *State of Maryland*, 436 F. Supp. 226 (D. Md. 1977). The only requirement is that "each offense proscribed [must require] proof of some fact that the other does not." *United States* v. *Ponder*, 522 F.2d at 943.

But it is also now clear that when a prosecutor is faced with an alleged offense which violates more than one statute with one being specifically tailored to the alleged offense involved, the prosecutor has no discretion to charge a defendant under any statute other than the specifically tailored one. *Busic* v. *United States*, 446 U.S. 398, 100 S. Ct. 1747, 64 L. Ed. 381 (1980); *Simpson* v. *United States*, 435 U.S. 6, 98 S. Ct. 909, 55 L.Ed.2d 70 (1978).

Simpson involved defendants who had been charged, convicted and sentenced under 18 U.S.C. § 2113(d) for committing a robbery "by the use of a dangerous weapon or device." They also had been sentenced under 18 U.S.C. § 924(c) for using "a firearm to commit any felony." That provision provides for an additional sentence of one to ten years for the first offense or for two to twenty-five years for subsequent offenses. The additional sentence imposed under § 924(c) cannot run concurrently with the sentence imposed for the underlying felony.

In holding that the government could not prosecute the defendants under both statutes, the Court did not reach the identity of elements issue of *Blockburger*. Instead the Court avoided that question[7] and based its decision on legislative history, the leniency rule, and the principle that "the more

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[7] The Court avoided the issue because the *Blockburger* test goes to the question of double jeopardy—a constitutional question. Before reaching such an issue, of course, the Court will attempt to resolve a statutory question through non-constitutional analysis.

specific statute" will be given precedence over a general provision which speaks "to the same concern." 435 U.S. at 15, 98 S. Ct. at 914, 76 L. Ed. at 303.

In *Busic*,[8] the Court extended *Simpson* to hold that the prosecutor may not choose his statute but must proceed under the more specific one.

Despite specifically declining to reach the identity of elements issue, the Court pointed out in both *Simpson* and *Busic* that the proof required under the two statutes was, in fact, identical.

The legislative history of the mail fraud statute is scanty at best. The predecessor to the present mail fraud statute was passed in 1889, Act of March 2, 1889, Ch. 393, 25 Stat. 873. The history as it is indicates that the statute was aimed principally at schemers who attempted to sell counterfeit currency through the mails. *See* H. R. Rep. No. 1501, 50th Cong., 1st Sess. (1888); S. Rep. No. 2566, 50th Cong., 2d Sess. (1889). It is obvious, therefore, that the mail fraud authors could not have contemplated its use in a setting such as the one before this court.

The false claims act is based on a 1909 statute, Act March 4, 1909, Ch. 321, § 35, 35 Stat. 1095, and its purpose was to protect funds and property of the government from fraudulent claims. *Rainwater* v. *United States*, 356 U.S. 590, S. Ct. 946, 2 L. Ed.2d 996 (1958). There is nothing specifically in the legislative history that would indicate that it was intended either to supplement or to replace the mail fraud statute vis-a-vis the government.

The rule of leniency requires that "doubt will be resolved against turning a single transaction into multiple offenses."

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[8] *Busic* also involved §§ 2113(d) and 924(c).

Bell v. *United States*, 349 U.S. 81, 84, 75 S. Ct. 620, 99 L. Ed. 905 (1955).

> This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what congress intended.

Ladner v. *United States*, 358 U.S. 169, 178, 79 S. Ct. 209, 211, 3 L. Ed.2d 199, 200 (1958).

Under the rule of *Simpson* as amplified in *Busic*, this Court must apply

> The principle that gives precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern.

Simpson v. *United States*, 435 U.S. at 15.

The elements of a mail fraud violation are: (1) formation of a scheme with the intent to defraud; (2) using or causing the use of the mails; (3) in furtherance of the fraudulent scheme.[9] The elements of a false claims violation under § 287 are: (1) making or presenting a claim against the United States or any agency or department thereof; (2) such statement must be false, fictitious or fraudulent; and (3) the defendant must know that his claim is false, fictitious or fraudulent.[10]

While a recitation of the elements of the two crimes would make it appear as if the offenses are somewhat different — thereby avoiding the *Blockburger* test — in practice, when the false claim is mailed to the government, the offenses are identical. The only difference between a false claim violation and a

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[9] For a discussion of the mail fraud elements see 18 Am. Crim. L. Rev. 199-205 (1980).

[10] For a discussion of the false claims elements see 18 Am. Crim. L. Rev. 282-86 (1980).

mail fraud violation, when the mail fraud is based on a false claim, is the use of the mails.

The indictment involved in this case charges the defendants with mail fraud by causing the Treasury Department to issue checks and send them through the mails. However, it is the policy of the Treasury Department to make *all* disbursements to contractors by mail. In the Department of the Treasury, Division of Disbursement Procedure Manual, Part 3, "Payment, Services and Operations" p. 34-24, it is written that

> It will be the policy of the Division of Disbursement to mail all checks to vendors. As a general rule, checks issued in payment of obligations of the United States must be mailed directly to the payees at their bona fide address. (See Comptroller General Decision A-83685, March 12, 1937.)

By virtue of this policy, any false claim submitted by a vendor will — as long as the false nature of the claim is not discovered immediately — cause a use of the mails by the Treasury Department.

The same is true for those counts of the indictment which charge software fraud. In these counts, however, the indictment does allege that invoices were mailed by the defendants. The gravamen of the offense, nevertheless, is presenting "a claim against the United States . . . knowing such claim to be false, fictitious, or fraudulent." § 287.

Under the theory the prosecutors followed in this case, virtually all false claims charges could be transformed into mail fraud charges, with the attendant increase in penalties and with the potential for transforming great numbers of garden variety false claims cases into RICO cases. The prosecutors would have this court sanction a method of racheting an offense specifically proscribed into another offense so that it can bring it within a third statute — RICO — the penalties of which are vastly more serious and which would allow the government to subject the defendants to the forfeiture provisions. The use of this building block method in a criminal case requires close

scrutiny by the court, which is charged with insuring that the criminal justice system operates fairly. Accordingly, the court will not approve such a stretching of the acts involved in this case. It is the court's opinion that Congress did not intend to have mail fraud charges tacked onto all false claims charges, and certainly did not intend to have false claims charges become the basis for RICO charges. In fact, Congress excluded false claims from the list of offenses categorized as racketeering activities in § 1961(1).

The wire fraud allegations, which were brought pursuant to 18 U.S.C. § 1343, are subject to the same analysis as the false claims. Any time a computer company is providing services to the government and that company is alleged to have submitted false claims regarding that service, wire fraud, under the theory the prosecutors have followed in this case, could be charged. Still, the false claims statute is the more particularized statute under which the claims should be brought. Furthermore, the only involvement of the interstate wires in this case was the use of the wires to provide this service. There is no allegation that the service was in any way deficient or fraudulent. None of the false representations are alleged to have been communicated over the interstate wires. For this additional reason, therefore, § 1343 is inapplicable.

Having decided that neither the mail nor the wire fraud charges are proper, Counts 4 through 43 must be dismissed.[11]

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[11] In making this decision, this court is aware of the Seventh Circuit's holding in *United States* v. *Weatherspoon*, 581 F.2d 595 (7th Cir. 1978). In *Weatherspoon* the court held that a defendant could be charged with both mail fraud under § 1341 and making false statements in violation of 18 U.S.C. § 1001. That case, however, involved a different statute and presented less compelling reasons for following the *Simpson-Busic* reasoning. The case involved a fact situation involving a defendant presenting fraudulent certificates of attendance to the Veterans Administration for the purpose of receiving VA

The dismissal of these counts would alone require the dismissal of Counts 1 through 3, since the predicate acts on which the RICO charges were brought were the one incident of bribery and the mail and wire fraud incidences. This being the case, the court need not address the issue argued by defendants that the bribery allegation is barred by the statute of

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educational benefits. That case, unlike the case now before this court, did not involve a situation in which virtually anyone who violated § 1001 would *have* to violate § 1341 and thus have the offense pyramided as a matter of course.

The government also cites the court to *United States* v. *Huber*, 603 F.2d 387 (2d Cir. 1979) and *United States* v. *Precision Medical Laboratories, Inc.*, 593 F.2d 434 (2d Cir. 1978). In *Huber*, the defendant was charged with having violated RICO, §§ 1961, 1962(c), 1963 and 18 U.S.C. § 2, as well as the false statements statute, § 1341, and several other statutes. In short, the defendant was charged with submitting inflated invoices for hospital supplies to the hospitals which in turn were reimbursed by the federal government under the Hill-Burton Act, 42 U.S.C. § 291 *et seq.* The Second Circuit upheld the conviction without specifically addressing the argument raised by defendants in the case before this court. But in so doing the court clearly believed that the evidence had shown that the mail fraud had been committed when "the mails were used in connection with the scheme to defraud the hospitals." *Id.* at 391. Clearly that case is distinguishable since the hospitals were not being reimbursed 100% by the federal government, thus causing the hospitals to pick up a portion of the fraudulently inflated tab.

In *Precision Medical Laboratories*, the defendant was convicted of submitting false claims to the government in connection with laboratory services performed for patients covered by the Medicare and Medicaid programs. The indictment charged violations under § 287 and § 1341. While this case is more closely related to the case at bar than *Huber*, the defendant apparently never made the argument the defendants have made in the case before the court. The Second Circuit, therefore, did not address this question. For this reason, that case is of minimal value to this court.

limitations and cannot be a predicate act for a RICO charge. Without the mail and wire fraud charges, the bribery allegation would be the only predicate act on which to base a RICO charge. There being only one, there can be no "pattern of racketeering activity."

For the reasons stated above, therefore, Counts 1 through 43 are hereby dismissed with prejudice. Because of the court's dismissal of these counts, it is unnecessary to address the other arguments the defendants made in this motion.

II.

THE CONDUCT ALLEGED AS FRAUDULENT WAS AUTHORIZED BY A REASONABLE INTERPRETATION OF THE CONTRACT

The defendants argue that all counts of the indictment should be dismissed as the conduct alleged as fraudulent was authorized by a reasonable interpretation of the contract. For this proposition, the defendants cite the recent Fourth Circuit decision in *United States* v. *Race, et al.*, No. 78-5140 (4th Cir., September 25, 1980).

The *Race* decision involved a contract between Consolidated Services, Inc. ("CSI") and the Charleston, South Carolina Naval Supply Center. This contract secured the delivery of labor and services, indefinite as to quantity, time and materials but subject to an ultimate dollar limit.

The Navy, charging a violation of 18 U.S.C. § 1001, alleged that CSI charged the Navy a travel per diem rate greater than that it actually paid its employees. CSI argued that such a billing was authorized by the contract. The Court of Appeals noted that the "exact language of the clause is as clear-cut and precise as a careful drafter could make it" and was "convinced that the contract very clearly authorized CSI to bill the Navy" at the higher rate. Slip op. at 11, 13. It noted that the clause in question involved "no words of art, but only words of common

understanding, requiring no special expertise for their interpretation." *Id.* at 14. Thus, it held that the meaning of the clause, "couched as this one is was in language of common use and understanding, was purely a matter of law for the court" and that the district court should have granted a motion to dismiss. *Id.*

The Court of Appeals stated further that had the provision been ambiguous, that is, susceptible of at least two reasonable interpretations, and had CSI's conduct come within one of those interpretations, it could not be held criminally liable under a reasonable doubt standard. The court noted that "one cannot be found guilty of a false statement under a contract beyond a reasonable doubt when his statement is within a reasonable construction of the contract." *Id.*

The NTS contract is not "clear-cut," "precise," or comprised of "words of common understanding." At this stage of the proceedings, it is impossible for the court to make a determination of what is and is not reasonable under the complex and technical NTS contract. The *Race* decision does not compel a district court to conduct a lengthy pretrial hearing to determine the meaning of a complex, highly technical contract where the identical issues will have to be put before the jury again if the matter is tried.

The *Race* decision is applicable to Counts 44 through 55 of the instant indictment just as the reasonable doubt standard is applicable. However, this motion is brought under Fed. R. Crim. P. 12(b). In order to prevail on this motion, the defendants must show a defect in the indictment. Counts 44 through 55 properly allege violations of 18 U.S.C. § 287 and no further inquiry need be made. Consequently, while the *Race* decision is applicable to these facts and while the contract should be construed by the court, the defendants' motion is more properly made under Rule 29 at the close of the government's evidence.

III.

COLLATERAL ESTOPPEL AND PROSECUTORIAL VINDICTIVENESS

Defendants Peter Loux and Herbert Blecker move to dismiss the indictment against them for two reasons not applicable to the other defendants. First, they claim that under the double jeopardy clause of the Fifth Amendment, the government is collaterally estopped from prosecuting this indictment. They allege that in an earlier prosecution, *United States* v. *Icarus Corp., et al.*, Cr. No. 79-137-A, Eastern District of Virginia, it was determined that Loux and Blecker had not conspired to defraud the government. Secondly, these defendants contend that they have been deprived of due process of law as a result of prosecutorial vindictiveness. They allege that bringing this action after their vigorous defense in the earlier action at the least appears vindictive and hence the indictment should be dismissed.

These motions were argued on January 7, 1981. The motions were denied from the bench on that day. On January 30, 1981, these defendants, by counsel, proffered a digest of the transcript of the earlier action. By a bench ruling on February 13, 1981, the court opened the record to admit this digest and then treated the expanded record as though it was before the court as a motion for reconsideration.

After careful consideration of the briefs, arguments of counsel, the digest and the indictments, the court is of the opinion that Blecker's and Loux's motions should be denied.

A. The Collateral Estoppel Motion

An indictment that involves essential elements of facts and law which have been tried and decided in an earlier case should be dismissed. *Ashe* v. *Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 469 (1970); *Brown* v. *Ohio*, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 187 (1977). In ruling on such a motion, the court must determine exactly what was decided at the earlier trial. *United States* v. *Davis*, 369 F.2d 775, 777 (4th Cir. 1966), *cert. denied*,

386 U.S. 909, 87 S. Ct. 858, 17 L. Ed.2d 783 (1967). It is the burden of the moving party to demonstrate that the issue they urge is foreclosed logically constituted the basis of the earlier jury verdict. *Id.* "Only those issues necessarily determined by the first jury are conclusive in a second trial." *Id.* However, "the inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.' " *United States* v. *Davis*, 460 F.2d 792, 796 (4th Cir. 1972), quoting *Ashe* v. *Swenson, supra*, 397 U.S. at 444, 90 S. Ct. at 1194, 25 L. Ed. at

Defendants allege that the issue of whether there was any conspiracy to defraud the government was resolved against the government by the earlir trial. The government may not prosecute some aspects of the conspiracy in one case and, after an acquittal of the defendants, prosecute other aspects of the same conspiracy. Conspiracy is a single crime. *Short* v. *United States*, 91 F.2d 614, 622 (4th Cir. 1937).

As the court has dismissed the conspiracy counts of the indictment, the defendants' motion to dismiss on grounds of collateral estoppel is moot.

Even if the motion was not mooted, the defendants' assertion that the conspiracy involved in this action and the conspiracy involved in the earlier indictment are the same has no merit. The two indictments do involve overlapping periods of time and do occur in the same location. In the first indictment, the co-conspirators are alleged to be Icarus Corporation, Herbert Blecker, Peter Loux, and Paul Scanlon. In this indictment, the co-conspirators are Computer Sciences Corporation, John Luke, Erwin Allen, Thomas Marti, Norman Derrick, Peter Loux, and Herbert Blecker. In the first action the conspiracy allegation involves transactions between Blecker, Loux, Icarus and Scanlon to present false invoices to CSC who then, presumably innocently, would pass the invoices on to the federal government. Blecker and Icarus would falsify the resumes of Icarus Corporation employees. Loux would approve these resumes for CSC after which Loux and Blecker and

Icarus would mail the inflated invoices from CSC to the GSA for payment.

In addition, Blecker allegedly paid kickbacks to Loux in exchange for Loux's generating work for Icarus Corporation under a contract between CSC and the government. Payments from Loux would then be made to Scanlon as president of Data Processing & Technical Consultants. Blecker and Icarus invoiced CSC for work performed, Loux would issue to Icarus a fictitious invoice from Data Processing & Technical Consultants. Upon receipt of that invoice, Blecker and Icarus would draw a check payable to Data Processing & Technical Consultants.

While the second indictment also charges mail fraud and False Claims Act violations, the underlying conduct is totally different. In this criminal prosecution, Loux and Blecker allegedly conspired with Luke, Allen, Marti and Derrick and CSC to conduct Infonet's affairs through a pattern of racketeering activity. As a part of this pattern, they allegedly defrauded the government by increasing the amount charged for the use of the COST/BPS software system. Allegedly these defendants misled the GSA into believing that a new software product with additional features had been devised and that the old system was no longer available. The mail fraud substantive counts against Loux and Blecker include invoices submitted on different dates than those involved in the first indictment with the exception of one invoice. Lastly, this prosecution alleges that the other defendants along with Loux and Blecker presented a false claim to GSA for "application charges."

The conspiracy alleged in the first indictment relates to that of the second indictment only in that the same contract with the government was in question and defendants Loux and Blecker were involved. The scheme alleged in the second indictment is a different and totally unrelated scheme. The software product of Icarus, COST or COST/BPS, was not at issue at all in the first indictment or trial, although there were scattered references to it. In the first indictment, the Icarus invoices were

alleged to be fraudulent and that they were based upon false resumes. In the present indictment they are false in that the amount claimed for "application charges" was based upon a misrepresentation as to the nature of the software system. The first indictment only involved labor charges, as distinguished from the cost of the software program. The conspiracy involved in the instant indictment also differs from the first conspiracy in that CSC and its officers were not alleged to be members of the earlier Blecker-Loux conspiracy, and in fact were dupes of that scheme. In the instant indictment, the heart of the conspiracy is a scheme to conduct the affairs of CSC's Infonet Division through acts of racketeering.

Consequently, the court is of the opinion that no facts concluded in the former trial have again been put in issue in this case. As a result, no facts involved in the instant action can be held to be established by collateral estoppel.

B. Prosecutorial Vindictiveness

The defendants argue that the indictment against Blecker and Loux should be dismissed because their right to due process of law has been violated as the conduct of the prosecutors contained a "realistic likelihood" of vindictiveness. Citing *Blackledge* v. *Perry*, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed.2d 628 (1974), they argue that the appearance of vindictiveness rather than vindictiveness in fact controls a determination of whether a defendant's due process rights have been violated. They urge that charging an individual with additional criminal acts after he has asserted his rights against an initial charge is prohibited, if the government knew the factual basis for the charges at the time of the initial decision to indict.

Where a defendant has exercised his rights, and the prosecutor, on the same facts, has indicted him on more serious charges, vindictiveness may be presumed. Thus, in *United States* v. *Johnson*, 537 F.2d 1170 (4th Cir. 1976), the prosecutor obtained a superceding indictment on the same facts where a guilty plea to drug charges was overturned on appeal. The

Fourth Circuit there allowed the conviction to stand on the counts brought in the original indictment, but dismissed counts which were not present in the first indictment. In *United States* v. *De Marco*, 550 F.2d 1224 (9th Cir. 1977), the government obtained a superceding indictment on the same facts as the original indictment. These facts were known to the government before the first indictment was obtained. The Court of Appeals held that due process required dismissal of the new indictment. In *United States* v. *Andrews*, 612 F.2d 235 (6th Cir. 1979), the defendants were allowed to make bail, despite the government's request that they not be admitted to bail. The government obtained a superceding indictment with a conspiracy count on the identical facts. This conduct was held to be impermissibly vindictive.

The situation presented here by the two indictments charging Loux and Blecker is very different. Two schemes are involved. The conduct involved is different and distinct. The co-conspirators are different. It is not clear that the government possessed information sufficient to bring this indictment at the time the Blecker-Loux indictment was returned. According to the affidavits submitted in opposition to this motion, twenty-nine interviews were conducted after the first indictment. Additional subpoenas duces tecum were issued and several additional witnesses testified to the grand jury.

Even assuming the government has produced sufficient evidence to indict both schemes at the same time, there is a strong argument that it should not have done so. The two prosecutions simply do not involve the same facts or the same acts. The prosecutors here have merely exercised their discretion to structure the prosecution of two totally different schemes with two different indictments.

Lastly, an element of prosecutorial vindictiveness is that the later charges are the greater magnitude than the earlier charges. Given this court's ruling dismissing Counts 1 through 43 of the indictment, it cannot be said that the charges brought

against Blecker and Loux are of a greater magnitude than those brought in the first indictment.

For these reasons, the motion of defendants Blecker and Loux to dismiss on grounds of prosecutorial vindictiveness is denied.

IV.

THE GRAND JURY WAS NOT FULLY INFORMED

All of the defendants move for a dismissal of the indictment on the ground that it was not properly found and concurred in by twelve or more informed grand jurors, as contemplated by the Fifth Amendment of the Constitution and Rule 6(f), Fed. R. Crim. P.

Specifically, the defendants allege that the twenty-nine page indictment returned by the grand jury in this case is so "incredibly arcane and complex, both in terms of the statutory offenses charged and in terms of the facts alleged" that it is impossible for lay grand jurors to make an informed, independent determination of the matters contained in the indictment.

The court finds no merit in the defendants' contentions. To accept the position is to hold that the presence of technical terms in an indictment gives rise to a presumption that a lay jury cannot fulfill its mission. Such a holding would require that a grand jury always be composed of experts in the field in which those under investigation are engaged. To hold that the legal theories set forth in this indictment are not comprehensible to lay people would require that, in any minimally complex case, the grand jury be composed of criminal lawyers. The court finds no need in this case for such a blue ribbon panel. Neither does the Fifth Amendment contemplate such a grand jury.

The indictment here is perfectly regular on its face. An indictment regular on its face is not subject to challenge on grounds of the adequacy of the evidence, *e.g.*, *Reyes* v. *United*

States, 417 F.2d 916 (9th Cir. 1969); *United States* v. *Bertolotti*, 529 F.2d 149 (2d Cir. 1975); *United States* v. *Guillette*, 547 F.2d 743 (2d Cir. 1976); *United States* v. *Radetsky*, 535 F.2d 556 (10th Cir. 1976); *United States* v. *Herbst*, 565 F.2d 638 (10th Cir. 1977); *United States* v. *Fried*, 576 F.2d 787 (9th Cir. 1978); *United States* v. *Gallagher*, 602 F.2d 1139 (3d Cir. 1979).

Defendants ask that the court conduct a full-blown trial to determine what evidence was presented to a grand jury in any instance where technical terms are repleat in the indictment or where multiple offenses are charged. The court declines that invitation.

V.

JURY SELECTION PROCEDURES

All defendants have moved to dismiss the indictment, alleging that jury selection procedures in the Eastern District of Virginia violate federal law and the Constitution of the United States. Specifcally, defendants allege a violation of the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861, et seq., and of the Fifth and Sixth Amendments to the Constitution.

A. The Eastern District Of Virginia Jury Selection Plan

The United States District Court for the Eastern District of Virginia adopted a written plan for random selection of grand and petit jurors entitled "Plan Proscribing Method for Composition of Jury Wheels and Selection of Jurors in All Divisions of this District in Accordance with the Jury Selection and Service Act" (hereinafter the "Plan"). The Plan provides that the "source list" of potential jurors is to be compiled from the voter registration list of the Eastern District of Virginia. A master jury wheel is selected, consisting of names drawn directly from the source list. The master wheel is large enough to satisfy estimated juror needs for a period of at least six months and up to two years. From time to time, at the direction of the Clerk of the Court, names and addresses are drawn from

the master wheel and juror qualification questionnaires are mailed to these people in order to compile a "qualified wheel."

The Clerk examines the completed and returned questionnaires and eliminates people who must be excluded because they are statutorily disqualified or exempt. Congress has exempted those who have not resided in this jurisdiction for at least a year or who cannot speak English or are so illiterate that they cannot fill out the qualification form or are incapable because of mental or physical infirmity or are convicted felons. 28 U.S.C. § 1865(d). Congress also exempted three groups of citizens: members of the armed forces, policemen and firemen and public officials. 28 U.S.C. § 1863(b)(6).

Other people are eliminated because the Plan, purportedly in conformity with 28 U.S.C. § 1863(b)(5), allows these people a privilege to excuse themselves from jury duty by making a request for an excuse on the returned questionnaire. The Plan gives nine occupational groups—lawyers, doctors, dentists, pharmacists, nurses, school teachers and supervisors, clergy, morticians, and some individuals engaged in the movement of interstate commerce—the privilege of excusing themselves. In addition, before the March 10, 1980 amendments to the Plan, all females with legal custody of a child twelve years of age or younger were allowed to excuse themselves.[12]

Those persons who are not eliminated on the basis of the questionnaire are placed on the qualified wheel. Random drawings from this wheel produce the names of persons who are then summoned to appear for service as grand or petit jurors. Anyone who is actually summoned for jury service under 28 U.S.C. § 1866(c)(1) may be excused by the court by a personal showing of undue hardship or extreme inconvenience.

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[12] The Plan now provides for the exclusion of all persons having legal custody of a child the age of ten or under. The grand jury in this case was selected before the amendment.

B. The Constitutional Challenge

The Fifth and Sixth Amendments to the Constitution entitle defendants in criminal cases to grand and petit juries selected at random from a fair cross section of the community. *Taylor* v. *Louisiana*, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 690 (1975). The standard for determining when the Sixth Amendment requirement to a fair cross section has been violated is provided by *Duren* v. *Missouri*, 439 U.S. 359, 364, 99 S. Ct. 664, 58 L. Ed. 579 (1979):

> In order to establish a prima facie violation of the fair-cross section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Fifth Amendment "Due Process" cases differ from Sixth Amendment cases in that a discriminatory purpose is an essential element of the violation. *Castenada* v. *Partida*, 430 U.S. 482, 97 S. Ct. 1272, 51 L. Ed. 498 (1977). It is a defense to a Fifth Amendment case that the government had a non-discriminatory purpose while in the Sixth Amendment context, "systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section." *Duren* v. *Missouri*, *supra* at 368, n. 26.

The defendants do not allege, and this court does not find, any discriminatory purpose in allowing these ten groups of individuals to excuse themselves from jury service. The Court's purpose in formulating the Plan was to provide juries drawn from a broad cross section of society while minimizing delays and expense to the justice system and undue hardship to those subject to service. The Plan thus does not violate the Fifth Amendment.

Despite the great wealth of legal talent and energy in the large group which makes up the defense team, the defendants have provided the court no evidence regarding the representation of the excluded occupational classes and women with young children in the qualified wheel from which jurors are summoned. They have also not presented the court with any evidence regarding the representation of these groups in the voter registration list of the Eastern District of Virginia. Rather, they provide data from the 1970 census regarding the work force of the entire Commonwealth of Virginia. Aggregating all of the excluded occupational groups from Virginia's work force in 1970, these groups represent 9.1% of the labor force. Regarding mothers with children under twelve, defendants represent that the 1970 census report for Virginia shows that 40.5% of the 1,654,442 women in Virginia over the age of sixteen have children under the age of seventeen.

Defendants' statistical showing simply fails to make out a prima facie case. The court has no basis on which to conclude who is and is not represented in the qualified wheel. The defendants have not represented to the court that the Clerk of the Court has been unwilling or unable to provide data on the qualified wheel. Instead, the defendants complain that Virginia, unlike Massachusetts, does not keep such information on a computer. An alleged lack of sophisticated data retrieval does not give this court license to base a decision upon ten year old data regarding the work force of the entire state when the relevant concern is current data on the voter lists and the qualified wheel of this District.

Thus, the court need not reach the first and third concern of *Duren* v. *Missouri*, *supra*. There is no need to decide whether each of the occupational groups or, as defendants claim, the aggregate of the excluded groups is a "distinctive" group in the community. Neither does the court have to determine whether an unproven representation is the result of systematic exclusion.

It is the burden of the defendants to establish a prima facie case. *United States* v. *Smaldone*, 485 F.2d 1533, 1547 (10th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974). Defendants have failed to meet that burden and their motion must be denied.

C. The Statutory Challenge

The Jury Selection and Service Act of 1968, 28 U.S.C. § 1861, et seq. (hereinafter "the Act"), establishes the requirements for the selection of grand and petit jurors to serve in the federal courts. Section 1861 sets forth the policy of the United States to entitle "all litigants in the federal court [to] have the right to grand and petit jurors selected at random from a fair cross section of the community in the district or division wherein the court convenes." Further "all citizens shall have the opportunity to be considered . . . and shall have an obligation to serve as jurors." Exclusion from service on the basis of race, color, origin, sex and national origin or economic status is explicitly prohibited by § 1862. Section 1963 provides that each United States District Court shall devise a plan for random jury selection. Section 1863(b)(5) states that the court shall specify

> Groups of persons or occupational classes whose members shall, on individual request therefor, be excused from jury service. Such groups or classes shall be excused only if the district court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof and excuse of members . . . would not be inconsistent with sections 1861 and 1862.

Section 1867 provides that in criminal cases a defendant may move to dismiss the indictment or to stay the proceedings against him on the ground of a substantial failure to comply with the Act. This section also allows the moving party to present a "sworn statement of facts which, if true would constitute a substantial failure to comply with" the Act. In addition, the movant can present the testimony of the jury commission or the clerk and make use of "any relevant records and

papers not public or otherwise available used by the jury commission or the clerk and any other relevant evidence."

The exclusion of the occupational groups and of women with young children rests upon a factual finding by this court that jury service by these groups would entail undue hardship, extreme inconvenience or serious obstruction or delay in the fair and impartial administration of justice. The defendants must thus show that this finding by the district court is clearly erroneous. Other courts have held that exclusion of these same professional groups was not clearly erroneous. *United States* v. *Goodlow*, 597 F.2d 159, 162 (9th Cir. 1979), *cert. denied*, 442 U.S. 913, 99 S. Ct. 2830, 61 L. Ed. 280 (1979). The finding as to women with children was upheld in *United States* v. *Test*, 550 F.2d 577, 595 (10th Cir. 1976), cited generally with approval in this circuit in *United States* v. *Coates*, 611 F.2d 37 (4th Cir. 1979), *cert. denied*, 446 U.S. 909, 100 S. Ct. 1836, 64 L. Ed. 261 (1980). Defendants have made no attempt to show that this court's reasoning is clearly erroneous.

In addition, *United States* v. *Test*, *supra*, holds that the standards for determining the validity of a jury selection plan under the Constitution and under the Act are identical. Thus, defendants have no more made out a prima facie case that the Plan violates the Act than they have that it violates the Constitution. Once again, the court can make no decision when it has not been provided with the data upon which the decision should be made. *United States* v. *Goodlow*, *supra*, at 162.

Defendants' motion under the Act to dismiss the indictment is also denied.

VI.

UNAUTHORIZED PERSONS INVADED THE SECRECY OF THE GRAND JURY PROCEEDING

Defendants have moved the court for a dismissal of the indictment on the grounds that unauthorized persons invaded the secrecy of the grand jury proceedings in violation of Rule 6, Fed. R. Crim. P.

Five intrusions of the grand jury have been pointed out. Of these five, four were by individuals presumably under the control of the Assistant United States Attorney. These four persons were never informed on the record that they should not come into the room. In three instances, documents were delivered to the prosecutors. These four instances, one by an unidentified woman and three by United States Marshals, all interrupted or occurred during the taking of testimony.

The five instances are as follows:

Incident #1.

On July 12, 1979, Paul N. Zeitlin was called to testify before the grand jury which returned this indictment. The transcript of that appearance, at page 12, reveals the following incident:

Q: Could you give us a, a layman's definition of an algorithm?

A: It's, it's a well-defined procedure.

Q: Do you—

A: You know, where, where there's nothing that says, "Toss a coin," or, or, you know, what phase of the moon it is, or, or something like that.

Q: Okay. In what context at CSC are the terms "algorithm" used?

(Whereupon, an unidentified woman entered the Grand Jury room; remarks were made toward Mr. Leiser on an unrelated matter off the record. The woman left the Grand Jury room, after which the following occurred:)

MR. LEISER: Just, just for the record, this is return of a document that was subpoenaed by this Grand Jury with the return dated this date and hand-delivered to us by an un-named individual who just came in the Grand Jury.

BY MR. LEISER (Resuming):

Q: Mr. Zeitman, [sic] the question I, I believe I asked you is: In what context at CSC are the terms "algorithm" or "algorithms" used?

* * *

Incident #2.

On pages 57-58 of the transcript of Mr. Zeitlin's testimony there appears the following transaction:

> Q: Mr. Zeitlin, do you know whether or not the Government group of weights were changed throughout the life of the contract? In other words, were there various changes to that Government group of weights? We know that there was a difference in that there were two; one group commercial, one group Government. The question now is whether or not the Government group was changed.
>
> (Whereupon, at 11:00 a.m. a U.S. Marshal entered the Grand Jury room, handed a document to Mr. Leiser, after which the following occurred:)
>
> THE MARSHAL: Mr. Leiser
>
> MR. LEISER: Yes.
>
> (Whereupon, the Marshal left the Grand Jury room, after which the following occurred:)
>
> MR. LEISER: Just so the record's clear, I just received a message from one of the Marshal's.

* * *

Incident #3.

On August 30, 1979, Thomas W. Fife appeared before the grand jury and the following episode occurred, as reflected on pages 3-4 of the transcript:

PROCEEDINGS

9:36 a.m.

> MR. LEISER: Mr. Fife, just step in here, please. The forelady will swear you in if you just put your left hand on the Bible and raise your right.
>
> (Whereupon, an unidentified male entered the Grand Jury room.)

A JUROR: We've got a maintenance man.

MR. LEISER: One second. One second please.

UNIDENTIFIED MALE: I'm from building maintenance. I understand you have a complaint about the—

MR. LEISER: Yes, it's too hot in here. There seems to be no air conditioning and we've got a Grand Jury that's presently—

UNIDENTIFIED MALE: It's 78 degrees.

MR. LEISER: Okay. Fine. If that's as cool as you can get it, we'll accept that. You've got to leave the Grand Jury room.

UNIDENTIFIED MALE: Okay, you know. I had to check out a complaint. If you all have a complaint, I have to check it out.

MR. LEISER: Okay. Fine. If you could make it any cooler, we'd appreciate it.

UNIDENTIFIED MALE: No Sir.

MR. LEISER: If you can't—

UNIDENTIFIED MALE: No Sir.

MR. LEISER: Okay, thank you.

(Whereupon, the above unidentified male left the Grand Jury room, after which the following occurred.)

MR. LEISER: Mr. Fife, if you'll—

THOMAS W. FIFE, called as a witness by the Government, having been first duly sworn, was examined and testified as follows:

* * *

Incident #4.

On April 3, 1980, Clinton DeGabrielle was called before the grand jury. As set forth on pages 22-23, the grand jury proceedings were again interrupted by an outsider:

A: Let me try and give you an example in lay terms. If you take a standard truck and you add an oversized

back end to it and that costs you "Y" number of dollars and you keep using that truck until whatever your need is requires more capacity and you make an overt decision rather than to buy a second truck—

(Whereupon, a Marshal entered and left the Grand Jury room.)

THE WITNESS: —you're going to increase the capacity of the back end, ...

* * *

Incident #5.

On August 13, 1980, Mr. Kenneth Walls appeared before the grand jury and the following intrusion was recorded at page 5.

Q: Referring to the period of time when you were Director of Operations, that is from sometime in 1973 until 1977, what was your function as Director of Operations?

A: I was responsible for the operation of computer centers,—

(Whereupon, at 11:21 a.m. there was a knock on the Grand Jury room door, after which the Marshal opened the door, and passed unidentifed documents to Mr. Lynch, and left the room, after which the following occurred:)

BY MR. LYNCH (Resuming):

Q: Yes, sir, continue.

* * *

Rule 6(d), Fed. R. Crim. P., explicitly limits the persons who may enter the grand jury room while it is in session:

(d) *Who May Be Present.* Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but not other persons other than the jurors may be present while the grand jury is deliberating or voting.

A long standing and well recognized rule in the federal courts is that the mere appearance of an unauthorized person

before a grand jury is a sufficient ground for dismissing an indictment. *United States* v. *Echols*, 542 F.2d 948, 951 (5th Cir. 1976); *United States* v. *Latham*, 226 F. 420, 422 (5th Cir. 1915); *United States* v. *Furman*, Cr. No. Y-80-0432, District of Maryland, 1981; *United States* v. *Phillips Petroleum Corp.*, 435 F. Supp. 610, 618 (N.D. Okla. 1977); *United States* v. *Braniff Airways, Inc.*, 428 F. Supp. 579 (W.D. Tex. 1977); *United States* v. *Kazonis*, 391 F. Supp. 804, 805 (D. Mass. 1975); *United States* v. *Bowdach*, 324 F. Supp. 123, 124 (S.D. Fla. 1971); *United States* v. *Borys*, 169 F. Supp. 366 (D. Alaska 1959); *United States* v. *Carper*, 116 F. Supp. 816 (D. D.C. 1953); *United States* v. *Amazon Industrial Chemical Corp.*, 55 F.2d 254, 261-62 (D. Md. 1931); *United States* v. *Edgerton*, 80 F. 374 (D. Mont. 1897). These courts have noted that it is nearly impossible for an accused to prove actual prejudice as a result of the presence of the unauthorized person. Rather, the presence of the unauthorized person has been held to result in a presumption of prejudice; or, at the most, the accused must show "probable prejudice." *United States* v. *Edgerton, supra; United States* v. *Carper, supra; United States* v. *Borys, supra.*

However, "probable prejudice," as applied, does not mean that it is more likely than not that an accused has suffered actual prejudice. Rather, probable prejudice is supplied by a showing that "there may have been improper influence or suggestion in the grand jury room while a witness was testifying." *United States* v. *Edgerton, supra; United States* v. *Borys, supra*, 169 F. Supp at 368; *United States* v. *Isaacs*, 347 F. Supp. 743, 749 (N.D. Ill. 1972). Another court has held that a defendant need only show "probable prejudice to the grand jury system." *United States* v. *Carper, supra*, 116 F. Supp. at 820.

The government in its brief urges that an indictment should be dismissed only when there is a sustained presence of an unauthorized person in the grand jury room that results in improper influence. It contends that the intrusions here were

momentary and carry no possibility of improper influence as no one, "except perhaps the marshal" who opened and closed the door heard testimony. The government contends that these facts should be treated as those in *United States* v. *Rath*, 406 F.2d 757 (6th Cir. 1969). In *Rath*, an attorney, waiting for another proceeding in the courthouse wandered into the grand jury room. The Assistant United States Attorney immediately halted proceedings and told the man to leave. The man left within twenty seconds of his entry.

With the exception of the intrusion by the maintenance man, the intrusions here are different from the brief, inadvertent *Rath* intrusion. Here, four of the five intrusions were by persons under the control of the United Staets Attorney. Three delivered documents and/or messages to him. Whenever persons obviously under control of the government flagrantly invade the grand jury, without reprimand, there is a possibility of undue suggestion or influence. When the government allows its supportive personnel to enter where a target witness's attorney or a child witness's mother or a juror's spouse may not, there is a great probability of, perhaps even certain prejudice to the grand jury system.

"The fact that grand jury proceedings are secret, *ex parte* and largely under the control of the federal prosecutor, magnifies [the] concern" the court must show" . . . for the right to indictment by an unbiased grand jury." *United States* v. *Serubo*, 604 F.2d 807, 816 (3d Cir. 1979). "[T]he grand jury is not meant to be the private tool of a prosecutor." *United States* v. *Fisher*, 455 F.2d 1101, 1105 (2d Cir. 1972).

Neither should the prosecutor allow himself or his staff privileges before the jury that its members or witnesses are denied. To allow marshals and an "unidentified woman" to interrupt a witness's testimony before the grand jury to deliver documents to or to have off the record conversations with the prosecutor is in gross violation of Rule 6 and destroys the secrecy and inviolacy of the grand jury proceedings. It is of no consequence that a witness has the good manners to stop in

mid-sentence and not to resume speaking until the intruder is gone. The prosecutor's receipt of messages and documents while a witness is on the stand may have profound psychological effects upon the witness. The witness may feel the document or message refutes his testimony; he may feel his testimony is so unimportant that interruptions are allowed; he may lose his train of thought, and so forth. The grand jurors may be influenced by the greater privileges the prosecutor allows himself. They cannot receive mail or business correspondence during the proceedings. The prosecutor, perceived as having special privileges, could attain even greater control and influence.

Thus, the unreprimanded intrusions here carry a strong possibility of improper suggestion and a grave threat to the grand jury system. These facts bear no similarity to *United States* v. *Rath*, *supra*. In this instance the court must ignore the likelihood of guilt of the defendants. The economic burden of reindicting is equally irrelevant. The grave cost to society of sanctioning repeated, unreprimanded intrusions into the grand jury room of persons under the control of or acting for the convenience of the federal prosecutor requires that this indictment be dismissed.

On February 27, 1981, fourteen days after the court's bench ruling dismissing the indictment on grounds of invasion of the grand jury, the defendants moved under Rule 6(e), Fed. R. Crim. P. for disclosure of the remaining transcripts of the grand jury. That motion is denied. The defendants have shown more than that "grounds may exist for a motion to dismiss the indictment;" they have shown that such grounds do exist and their motion has been granted. The court's ruling would not be affected by the presence or absence of additional instances of invasion.

CONCLUSION

In accordance with the order this day entered, Counts 1 through 43 are dismissed as to all defendants with prejudice; and dismissed as to the remaining defendants without prejudice.[13]

/s/ Richard L. Williams
United States District Judge
RICHARD L. WILLIAMS

Date: March 5, 1981

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[13] For reasons not discussed in this opinion, Counts 44 through 57 are dismissed as to defendant Derrick with prejudice.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Criminal No. 80-158-A

THE UNITED STATES OF AMERICA

vs.

COMPUTER SCIENCES CORPORATION., *et al.*

RULINGS ON MOTIONS

January 7, 1981

Hon. Richard L. Williams, Judge

THE COURT: Gentlemen, so you can more easily follow the Court's rulings, I will make them in the sequential order that they were heard in, and that appears in my letter of January 5 to Mr. Bonner and Mr. Lynch.

My basic scheme will be to announce my rulings, and then we will recess court until two o'clock. That will give you a chance to have some lunch and caucus if you need to, and we will reconvene at two o'clock so that I can hear from you on what evidence needs to be taken on January 14 and the limits that my various rulings impose on it.

On the Omnibus motion to dismiss all counts of the indictment that appears to have been joined in by all defendants, I sustain the motion as to all defendants insofar as they relate to Counts 1 through 43.

On the Omnibus motion insofar as it relates to Counts 44 through 57, the motion is denied.

On defendants Marti and Derrick's motion to dismiss Counts 1 and 2, their Rule 8 motion, and Rule 14 motion, I rule as follows. Their motion as to Counts 1 and 2 is mooted by my ruling on the Omnibus motion. Their Rule 8 motion is denied.

Their Rule 14 motion is denied, but on a trial of Counts 44 through 57 it will be my intention to require the Government to try Counts 56 and 57 first on a separation-of-counts trial, and I believe that will give them partial relief on their Rule 14 motion.

On item 3, all defendants' motion to dismiss Count 2, paragraph 4, that is mooted by my ruling on the Omnibus motion to dismiss.

On item 4, the motion to dismiss for improper Grand Jury selection, that motion is denied.

On item 5, a motion by Loux and Blecker to dismiss on grounds of collateral estoppel, that motion is denied to the extent that it was not mooted by my ruling on the Omnibus motion to dismiss.

On item 6, the motion to dismiss as to prosecutorial vindictiveness, that motion is denied to the extent that it is not mooted by my ruling on the Omnibus motion.

On item 7, the motion for severance by Loux and Blecker, that is covered by my ruling on motion No. 2. But, here again, I will require the Government under a separation-of-counts trial to procede with Counts 56 and 57 first, and I believe that that will clear up that situation.

On item 8, the motion by Luke, Allen, Marti, and Derrick for a change of venue, that motion is denied.

On item 9, Allen's motion to exclude the Parker memo, that is deferred until trial as it is more appropriately a trial issue. To the extent that I have heard substantial evidence and have read some of the filings on it, I have not been persuaded that the subject has much merit from the defendants' standpoint. But, nevertheless, a final ruling on that is deferred, but, to the extent that it is permissible to give you an advisory opinion, I am doing so.

On item 10, the United States' motion in limine on contract issues, a ruling on that is deferred until the trial as it is more appropriately a trial issue.

On item 11, the motion of the United States of America for a motion in limine for a ruling on evidence relating to fair market value, customer satisfaction, and possible sentencing, a ruling on that is deferred until the trial as it is a more appropriate trial issue.

I believe that there is one outstanding motion by Marti for a continuance for a time greater than that which was granted at the last hearing, and after having heard from all counsel, knowing the extent of Marti's involvement as it relates to the case, and the involvement of the other defendants, I see no reason why Marti ought to have continuance beyond the March 9 trial date, and that motion is denied.

Now, in view of those rulings, and after counsel have had a chance to discuss it with your various clients, and maybe get together and caucus amongst yourselves, I want you to report back to me at two o'clock on what you think you now need in the way of a hearing on the 14th,

My own view is very little because by eliminating the counts that I did I am not so sure that that didn't moot any claim that you have made now on prosecutorial misconduct. But, here again, that is scheduled for a different time and place and I will give you an evidentiary hearing on the 14th if you are so advised.

Recess court until two o'clock.

APPENDIX E

Title 18, United States Code, §§ 1961—1964, provide as follows:

§ 1961. Definitions.

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling business), sections 2314 and 2315 (relating to interstate transportion of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any

offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material' includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities.

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pat-

tern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1963. Criminal penalties.

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection

with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

§ 1964. Civil remedies.

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

§ 287. False, fictitious or fraudulent claims.

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

§ 1341. Frauds and swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out

to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

§ 1343. Fraud by wire, radio, or television.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communications in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Rule 6(d) of the Federal Rules of Criminal Procedure provides as follows:

Rule 6. The Grand Jury.

(d) Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

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No. 82-728

In the Supreme Court of the United States

OCTOBER TERM, 1982

COMPUTER SCIENCES CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in reversing a district court order dismissing the indictment against them on the grounds that: (1) the false claims statute, 18 U.S.C. 287, was the sole statutory provision under which they could be prosecuted for their alleged criminal conduct, and (2) the momentary entry of unauthorized persons into the grand jury room violated Fed. R. Crim. P. 6(d).

1. On October 8, 1980, petitioners were charged with various offenses (described below) in a 57-count indictment filed in the United States District Court for the Eastern District of Virginia. The indictment alleged that on March 21, 1972, the General Services Administration (GSA) entered into a contract with the Information Network Division (Infonet) of the Computer Sciences Corporation (CSC). Under the terms of the contract, CSC, through Infonet, was to provide the government with computer

services, such as data processing and computer programming, at a fixed price.

The indictment charged that petitioners engaged in at least three distinct criminal schemes relating to the contract with GSA. First, the indictment alleged that petitioner Luke bribed James Lindsey, a GSA contracting officer, in exchange for inside information to assist CSC in obtaining the contract. Second, the indictment alleged that petitioners fraudulently overcharged the government for computer processing services, in excess of the fixed price authorized by the contract. Third, the indictment alleged that petitioners fraudulently overcharged GSA for a particular computer program known as "BPS/C$T" by falsely representing that the program was a substantially improved version of a program previously provided to GSA at a lower price.

Count 1 charged petitioners with conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d). The enterprise was the Infonet Division of CSC. The alleged pattern of racketeering activity consisted of the following offenses: bribery (18 U.S.C. 201(b)); using the mails with intent to promote and carry on the bribery (18 U.S.C. 1952); mail fraud (18 U.S.C. 1341); and wire fraud (18 U.S.C. 1343). Count 2 charged petitioners with the substantive offense of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c). The predicate acts constituting the alleged pattern of racketeering activity consisted of essentially the same offenses that were alleged as predicate acts in Count 1. Count 3 charged petitioner CSC alone with using and investing income received from a pattern of racketeering activity in the operation of an enterprise (the Infonet Division), in violation of 18 U.S.C. 1963(a). The remaining counts of the indictment charged various petitioners with

mail fraud, wire fraud, and presenting false claims to an agency of the United States, in violation of 18 U.S.C. 287.[1]

On March 5, 1981, the district court issued an opinion and order dismissing the indictment (Pet. App. 21a-63a; 511 F. Supp. 1125). The court dismissed the mail and wire fraud counts (Counts 4 through 43) on the theory that the facts alleged in those counts also established violations of the false claims statute, 18 U.S.C. 287, and that the false claims statute was the exclusive vehicle for prosecuting on those facts (Pet. App. 34a-40a). The district court also dismissed the RICO counts (Counts 1 through 3) on three grounds: (1) the Infonet Division of CSC was not an "enterprise" within the meaning of the RICO statute; (2) the indictment failed to establish that the racketeering activity benefitted or advanced the Infonet Division; and (3) the mail and wire fraud charges having been dismissed, the RICO counts could no longer stand because the bribery allegation was the only remaining predicate act, thus leaving an insufficient number of predicate acts to form a "pattern of racketeering activity" (Pet. App. 28a-42a). Finally, the court held that the entire indictment was subject to dismissal because, on five occasions during the 18-month grand jury investigation, the proceedings before the grand jury were interrupted by the entrance into the grand jury room of persons not authorized to be present under Fed. R. Crim. P. 6(d) (Pet. App. 55a-62a).

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[1]Counts 4 through 27 charged petitioners CSC, Luke, Allen, and Marti with causing checks drawn on the United States Treasury to be mailed to CSC offices in Falls Church, Virginia, for the purpose of executing the scheme to defraud the United States, in which CSC overbilled GSA for computer services, in violation of 18 U.S.C. 1341. Petitioner Derrick was also joined in Counts 6 through 27.

Counts 28 through 37 charged petitioners CSC, Luke, Allen, Marti, and Derrick with causing wire transmissions to be sent between computer terminals in the Eastern District of Virginia and a computer center outside the State of Virginia for the purpose of executing a scheme to

On the government's appeal, the court of appeals reversed the district court's order in all respects, except that it affirmed the dismissal of the RICO counts (1-3) against petitioner CSC (Pet. App. 1a-18a).

2. Petitioners contend that because the indictment charges them with violating the false claims statute, 18 U.S.C. 287, the government is precluded from also attempting to prosecute them, for the same alleged misconduct, under the mail fraud (18 U.S.C. 1341), wire fraud (18 U.S.C. 1343) and RICO (18 U.S.C. 1961 *et seq.*) statutes. Accordingly, petitioners argue that the court of appeals erred in reinstating the mail and wire fraud counts and the RICO counts. Petitioners also contend that the court of appeals erred in ruling that dismissal of the indictment was not an appropriate sanction for the momentary entrances by unauthorized persons into the grand jury room during its proceedings.

Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court. The judgment that petitioners are challenging is not a conviction, but

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defraud the United States, in which CSC overbilled GSA for computer services, in violation of 18 U.S.C. 1343.

Counts 38 through 43 charged petitioners CSC, Luke, Allen, Loux, and Blecker with causing invoices that overbilled GSA for the BPS/C$T computer program system to be mailed from the Eastern District of Virginia to CSC offices in El Segundo, California, in violation of 18 U.S.C. 1341.

Counts 44 through 55 charged petitioners CSC, Luke, Allen and Marti with knowingly causing false claims to be presented to GSA for computer services, in violation of 18 U.S.C. 287. Petitioner Derrick was also joined in Counts 46 through 55.

Finally, Counts 56 and 57 charged petitioners CSC, Luke, Allen, Loux, and Blecker with knowingly causing false claims to be presented to GSA for the BPS/C$T computer program system, in violation of 18 U.S.C. 287.

rather is a ruling on their motion to dismiss the indictment. The court of appeals' decision places petitioners in no different position than they would have been in if the district court had ruled against them in the first instance. Since such an interlocutory ruling would not have been appealable by petitioners (*Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 29-31 (1943); *Heike* v. *United States*, 217 U.S. 423 (1910)), review of the court of appeals' decision at this time would be premature. If petitioners are acquitted following a trial on the merits, their claims will be moot. If, on the other hand, petitioners are convicted, then they will be able to present their present contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. We note, in this connection, that more than two years have elapsed since the filing of the indictment and petitioners have not yet been brought to trial. Petitioners have failed to present any persuasive reasons why this Court should further delay the trial of this case by departing from its usual practice of denying review in interlocutory cases.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1982

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[2]Indeed, the reasons advanced by petitioners in favor of immediate review (Pet. 9, 11, 20) demonstrate that this case is no different from many other interlocutory cases in which the Court has denied certiorari. Because this case is interlocutory we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

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v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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PETITIONERS' REPLY BRIEF

In his Memorandum in Opposition to our Petition for a Writ of Certiorari ("Mem. Op."), the Solicitor General has declined to address the merits of our Petition.[1] There is, therefore, no response to our arguments: (i) that the prosecution's legal theory overrides Congress' limitation

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[1] Although the Solicitor General purports not to address the merits, he has characterized the facts concerning the invasions of grand jury secrecy by asserting that Rule 6(d) was violated on only five occasions. Mem. Op. at 3. In fact, there were *at least* five intrusions into the grand jury, as shown by grand jury transcripts disclosed to the petitioners in pretrial discovery. The petitioners have never been given access to the remaining transcripts in order to determine if there were additional intrusions. Before the trial court, the prosecutors asserted that, on the basis of their *ex parte* review of the documents, there was one other possible violation of the Rule. Petition for a Writ of Certiorari at 18, n.9.

on the reach of the Racketeer Influenced and Corrupt Organizations Act of 1970 ("RICO"), 18 U.S.C. §§ 1961, *et seq.*, and perverts RICO's statutory policy of preventing the infiltration of legitimate businesses by criminal elements, (ii) that the prosecution improperly escalated corporate employees' submission of false claims into mail and wire fraud charges in contravention of rules of statutory construction announced by this Court in *Busic* v. *United States*, 446 U.S. 398 (1980), and *Simpson* v. *United States*, 435 U.S. 6 (1978), and in violation of the legislative history of the Mail Fraud law, and lower court precedent (*see United States* v. *Henderson*, 386 F. Supp. 1048 (S.D.N.Y. 1974)), and (iii) that the Fourth Circuit improperly refused to follow the rule, previously adopted by the Fifth and Eleventh Circuits (*see United States* v. *Echols*, 542 F.2d 948, 951 (5th Cir. 1976), *cert. denied*, 431 U.S. 904 (1977)) and most other federal courts (*see, e.g.*, *United States* v. *Lill*, 511 F. Supp. 50, 58 (S.D.W.Va. 1980)), that violations of the grand jury standards prescribed in Rule 6(d) of the Federal Rules of Criminal Procedure are *per se* grounds for dismissal of indictments before trial.[2]

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[2] The Solicitor General has agreed to "file a response on the merits if the Court requests." Mem. Op. at 5, n.2. This form of grudging piecemeal response is, we believe, demeaning to the Court and disruptive of its processes. A respondent should properly present all the reasons supporting his opposition in a single pleading rather than forcing this Court to consider objections to review in a sequential manner. The Solicitor General's reluctance to address the merits may result from inconsistency between the position of the Department of Justice concerning the grand jury claim in this case and the Department's position in *Illinois* v. *Abbott and Associates, Inc.*, No. 81-1114. In that case, the Solicitor General requested this Court to permit States to receive grand jury materials after the completion of

The Solicitor General has offered only one reason why this Court should decline review and that reason is, we submit, demonstrably wrong. Indeed, if it is seriously presented as a legal argument, it provides an additional ground for the granting of certiorari so as to determine its validity for future cases. The Solicitor General contends that "this case is interlocutory," Mem. Op. at 5, n.2, and is, therefore, not "ripe for review by this Court." *Id.*, at 4. This claim—which would foreclose review by this Court of all reversals by federal courts of appeal of pretrial dismissals of criminal indictments—conflicts with the intent of Congress in permitting the government to appeal to the courts of appeal from pretrial dismissals and other pretrial rulings in criminal cases. Neither precedent nor sound judicial policy supports the application of a rule that prevents this Court's review of a court of appeals decision when the government wins but not when it loses.

The Solicitor General relies on two decisions of this Court, *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21 (1943) and *Heike* v. *United States*, 217 U.S. 423 (1910), to support his contention that our petition is "interlocutory." Both cases, however, involved efforts to

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criminal proceedings. But the Solicitor General took a strong stand against "disclosure *during* a grand jury investigation" to any person, even if disclosure were accompanied by a protective order. Brief for the United States at 26, n.19, *Illinois* v. *Abbott and Associates, Inc.*, No. 81-1114 (emphasis added). The Department of Justice has not displayed a similar concern for the need for grand jury secrecy in this case, in which no purpose is served by permitting unauthorized intrusions into the grand jury. The need for secrecy here is surely greater than in situations where, as in *Illinois* v. *Abbott and Associates, Inc.*, material is sought to be disclosed for legitimate purposes through orderly court procedures.

appeal district court *denials* of defendants' pretrial motions. It is well established that Congress never intended to permit criminal defendants to appeal adverse pretrial rulings by district courts. *See Roche* v. *Evaporated Milk Assn.*, 319 U.S. at 30; *Heike* v. *United States*, 217 U.S. at 428.

By contrast (as this Court noted in *Roche* v. *Evaporated Milk Assn.*, 319 U.S. at 30, n.4), the government since 1907 has been allowed to appeal from the dismissal of an indictment. *See* 18 U.S.C. § 3731; R. Stern & E. Gressman, *Supreme Court Practice* 79-82 (5th ed. 1978). Indeed, until 1971, such issues were considered important enough to warrant direct review in this Court. *See, e.g., United States* v. *Mersky*, 361 U.S. 431, 434-36 (1960).

In 1971, Congress amended 18 U.S.C. § 3731 and provided that a government appeal from the dismissal of an indictment would first go to a court of appeals. That amendment reduced the workload of this Court by decreasing its mandated appellate jurisdiction. But Congress recognized that "cases in the courts of appeals may be reviewed by the Supreme Court . . ." on a petition for a writ of certiorari. H.R. Rep. No. 91-1768, *reprinted in* 1970 U.S. Cong. & Ad. News, 5804, 5849. No one remotely suggested the position now being urged by the Solicitor General—*i.e.*, that if a court of appeals reverses a district judge's dismissal of an indictment, the case must be treated, for purposes of further review, as if the district judge had denied a motion to dismiss. Such a rule would, in effect, oust this Court of jurisdiction to review issues which, prior to 1971, were deemed so important that *only* this Court could review them.

The Solicitor General apparently believes that 18 U.S.C. § 3731 should now be interpreted by this Court to

provide the United States with the right to appeal an adverse district court decision to the court of appeals and then to seek certiorari if its appeal is unsuccessful, but to deny a defendant an equal right to seek certiorari if the government, having lost in the district court, prevails at the appellate level. There is no evidence in the relevant committee reports to support the contention that Congress intended to construct such a one-way appeals process solely for the benefit of the government.

In fact, this Court has granted a petition for certiorari in precisely the same circumstances as are present in this case. In *Serfass* v. *United States*, 420 U.S. 377 (1975), a trial court dismissed an indictment and the government, invoking 18 U.S.C. § 3731, persuaded a court of appeals to reverse. The petitioner requested this Court to grant review and rule that the court of appeals' decision was improper. Althought the Court could have denied the petition for certiorari and awaited a post-conviction appeal—as the Solicitor General now maintains it must do—it granted certiorari and considered the petitioner's claim. *Serfass* thus demonstrates that our petition is in no way "interlocutory."[3] *See also Finch* v. *United States*, 433 U.S. 676 (1977) (*per curiam*).

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[3] In *Serfass*, the petitioner's substantive claim concerned the proper interpretation of the Double Jeopardy Clause. Two years after *Serfass* was decided, this Court distinguished double jeopardy claims from other pretrial grounds for a motion to dismiss. *See Abney* v. *United States*, 431 U.S. 651 (1977). At the time *Serfass* was decided and in the context of that opinion, however, there was no procedural difference in terms of finality between Serfass' claim and the petitioners' claims herein.

Moreover, the Court has granted petitions for certiorari in other analogous situations. 18 U.S.C. § 3731 also permits the government to appeal a pretrial suppression of evidence. In *Gooding* v. *United States*, 416 U.S. 430 (1974), this Court decided a suppression issue that came to the Court in precisely the same posture as this case. A defendant, indicted on charges of possession and concealment of narcotics, moved to suppress evidence seized from his apartment on the ground that the search warrant did not comply with the laws of the District of Columbia. The district court granted the defendant's motion, and the government took an appeal to the District of Columbia Circuit pursuant to 18 U.S.C. § 3731. *See* Brief for the United States at 11, *Gooding* v. *United States*, No. 72-6902. After the court of appeals reversed the suppression order, the defendant petitioned for a writ of certiorari to this Court. This Court granted the petition and decided the case on its merits.

The Solicitor General has also failed to recognize that in situations not governed by 18 U.S.C. § 3731 this Court has heard cases, on petition by criminal defendants, raising claims that proceedings should be terminated before trial. For example, in *Burroughs* v. *United States*, 290 U.S. 534 (1934), a trial court in the District of Columbia dismissed an indictment on the ground that the facts alleged did not state a criminal offense. The Court of Appeals of the District of Columbia reversed, but before the indictment proceeded to trial this Court granted certiorari on the defendant's petition. This Court's readiness to decide the defendant's claims on the merits demonstrated that it is not "premature" or "interlocutory" to consider the validity of an indictment before trial.

Nor is there substance to the Solicitor General's assertion that this case is not otherwise "ripe" for review. The

court of appeals considered and decided the issues presented to this Court, which are questions presented by this record—*i.e.*, whether the conduct alleged in the indictment states an offense under either RICO or the mail and wire fraud statutes (18 U.S.C. §§ 1341, 1343) and whether the district court properly remedied several violations of Rule 6(d). Neither claim requires further factual development in order for this Court to review the court of appeals' rulings.

Moreover, petitioners and the district court will be burdened by a lengthy and unnecessary trial if their position is correct and this Court now declines review because of the Solicitor General's "ripeness" assertion. And, as we noted in our Petition (p. 20), the claim based on grand jury intrusion is uniquely appropriate for judicial remedy *before* trial. This Court should, therefore, act promptly to (i) eliminate conflict among the circuits concerning the proper remedy for violations of Rule 6(d), (ii) quell confusion concerning the relationship between the false claims and mail fraud acts, and (iii) halt an avalanche of improper RICO suits, both civil and criminal.

In summary, the sole legal argument made by the Solicitor General in response to our Petition rests on a novel claim of statutory construction which significantly affects this Court's jurisdiction to hear important issues raised at the pretrial stage by criminal defendants. If a district court sustains a claim made at that juncture by a defendant, this Court should not be deprived of jurisdiction to consider that claim simply because the court of appeals disagrees with the district judge. In light of the Solicitor General's stated position, the parties to this case should be instructed to discuss the issue presented by the Solicitor General in their briefs on the merits. Resolution of the issue presented by the Solicitor General will aid both the government and the private bar by erasing any

uncertainty that may exist concerning reviewability in this Court of a court of appeals decision that reverses dismissal of a criminal indictment. The government will know whether—as it asserts—cases at this juncture are not suitable for this Court's review, and prospective petitioners will henceforth know whether their petitions will be treated by the Court as requests to review interlocutory decisions. Accordingly, the writ of certiorari should be granted on all issues raised by the petition and on the novel question now raised by the Solicitor General.

Respectfully submitted,

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